IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1128

PHOENIX NEWSPAPERS, INC., a corporation; and MICHAEL PADEV,

Appellants,

vs.

WADE CHURCH,

Appellee.

Jurisdictional Statement on Appeal From the Court of Appeals, State of Arizona, Division One, Department B.

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Dated: February 6, 1976.

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Jurisdictional Statement on Appeal From the Court of Appeals, State of Arizona, Division One, Department B.

Jurisdictional Statement.

Appellants appeal from a Judgment of the Court of Appeals of the State of Arizona, Division One, Department B, filed July 15, 1975, affirming a Judgment of the Superior Court of the State of Arizona, in and for Maricopa County, awarding damages against these appellants in a civil libel damage action brought by appellee, Wade Church, then Arizona Attorney General and a candidate for re-election, in the sum of $485,000 ($250,000 actual damages and $235,000 punitive damages). Eugene C. Pulliam, publisher of the Newspapers involved, was a party below but the case, as to him, was reversed for a new trial. He is now deceased.

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, pursuant to 28 U.S.C. 1257(2), and that substantial federal questions are presented.

Alternatively, should the Supreme Court consider Section 1257(2) inapplicable to the issues presented by way of appeal, then appellants respectfully request that the Court consider this Jurisdictional Statement in its entirety as a Petition for Writ of Certiorari pursuant to 28 U.S.C., Sec. 2103.[1]

Opinion Below.

The Opinion of the Arizona Court of Appeals was entered and filed July 15, 1975 and is reported in 537 P.2d 1345, 24 Ariz. App. 287. Appellants timely filed a Motion for Rehearing in the Court of Appeals which was denied by an unreported Order of that Court entered and dated September 15, 1975.

Appellants thereafter timely filed a Petition for Review with the Arizona Supreme Court which was denied by that Court in an unreported Order dated and entered December 9, 1975.

The Decision of the Arizona Supreme Court reversing the Judgment upon the first trial of this claim is found at 447 P.2d 840, 103 Ariz. 582.

Copies of the July 15, 1975 Opinion and Judgment of the Court of Appeals and of the unreported Orders of that Court and of the Arizona Supreme Court,

[1]Claims of denial by Arizona Courts of Petitioners' First Amendment rights which are not properly presented by appeal are included as within this Court's jurisdiction under the provisions of 28 U.S.C., Sec. 1257(3). *Flourney v. Wiener*, 321 U.S. 253, 264.

denying appellants' Motion for Rehearing and Petition for Review, are set forth in the Appendix. A copy of the Judgment of the Superior Court of Maricopa County, Arizona, affirmed by the Court of Appeals also appears in the Appendix.

Jurisdiction.

Appellants filed their Notice of Appeal to the United States Supreme Court from the Judgment of the Court of Appeals in the office of the Clerk of the Court of Appeals, at Phoenix, Arizona, on December 12, 1975.

Cases Sustaining Jurisdiction on Appeal.

Cases believed to sustain the jurisdiction of the Supreme Court on Appeal are:

(a) As involving a State Court Rule not adjudicative in character;

Lathrop v. Donohue, 367 U.S. 820, 824-827;

(b) As involving a State Statute fair on its face but contravening the United States Constitution as applied:

Dahnske-Walker v. Bondurant, etc., 257 U.S. 282;

Bantam Books v. Sullivan, 372 U.S. 58;

Fiske v. Kansas, 274 U.S. 380;

Hanson v. Denckla, 357 U.S. 235;

Cohen v. California, 403 U.S. 15;

Marcus v. Property Search Warrant, 367 U.S. 717, 6 L.Ed 2d 1127, 81 S.Ct. 1708.

The Statutes Involved on Appeal.

Rule 50(a), Arizona Rules of Civil Procedure, Vol. 16, A.R.S., p. 540, provides:

> "50(a) When made; effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence, in event the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor."

Rule 50(b), Arizona Rules of Civil Procedure, Vol. 16, A.R.S., p. 460, provides:

> "50(b) Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion

> for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Vol. 12, Section 12-2102 A.R.S., p. 558, provides:

> "Scope of review by supreme court upon appeal from final judgment.
>
> "A. Upon an appeal from a final judgment, the supreme court shall review any intermediate orders involving the merits of the action and necessarily affecting the judgment, and all orders and rulings assigned as error, whether a motion for a new trial was made or not.
>
> "B. If a motion for new trial was denied, the court may, on appeal from the final judgment, review the order denying the motion although no appeal is taken from the order.
>
> "C. On an appeal from a final judgment the supreme court shall not consider the sufficiency of the evidence to sustain the verdict or judgment in an action tried before a jury unless a motion for a new trial was made."[2]

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[2]The Arizona Supreme Court and the Court of Appeals in passing upon appeals from trial court judgments, based upon claimed error in trial court rulings upon motions for directed verdicts or for judgment n.o.v., has uniformly historically

(This footnote is continued on next page)

Questions for Review.

Question I.

Whether Arizona Rules of Civil Procedure 50(a) and 50(b) as applied by the trial courts in this case, as required by controlling Arizona precedents construing these Rules, in passing upon the sufficiency of the proof of "actual malice" in ruling upon appellants' Motions for directed verdict and n.o.v., and whether Section 12-2102 A.R.S. as applied by the Court of Appeals in this case as required by controlling Ari-

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adhered to the rule that the trial court in considering a motion for a directed verdict or a motion for judgment n.o.v. in cases involving a plaintiff's claims must accept all evidence admitted, favorable to the plaintiff, as true, must draw all permissible inferences in favor of plaintiff and must view all the evidence in a light most favorable to the plaintiff.

In re Est. of Accomazzo, (1972) 16 Ariz.App. 211, 492 P.2d 460;
Hudlow v. American Estate, etc., (1974) 22 Ariz.App. 246, 526 P.2d 770;
Lancaster v. Chemi-Cote Perlite, (1973) 20 Ariz.App. 229, 511 P.2d 673;
Anderson v. Muniz, (1973) 21 Ariz.App. 25, 515 P.2d 52.

On appeal Section 12-2102 A.R.S. has uniformly been given the same reading and the same rule governs the review function of the appellate tribunal. This is true even though the appellate court would have reached a different conclusion based upon its review of the evidence and permissible inferences to be drawn therefrom.

Rouillier v. A & B Schuster Co., (1916) 18 Ariz. 175, 157 Pac. 976;
Fritsche v. Hudspeth, (1953) 76 Ariz. 202, 262 P.2d 243;
State v. Ramos, (1972) 108 Ariz. 36, 492 P.2d 697;
Yahnke v. State Farm Fire & Cas. Co., (1966) 4 Ariz.App. 287, 419 P.2d 548;
Lehman v. Whitehead, (1965) 1 Ariz.App. 355, 403 P.2d 8;
Vreeland v. State Board of Regents, (1969) 9 Ariz. App. 61, 449 P.2d 78;
Farmers Inv. Co. v. Galloska, (1966) 4 Ariz.App. 346, 420 P.2d 489.

zona precedents in reviewing the sufficiency of the proof of actual malice on appeal, contravene the First and Fourteenth Amendments to the United States Constitution since, as applied by the Arizona Courts, neither a trial judge nor an appellate court may independently review and appraise the evidence to make sure the proof of "actual malice" in a civil libel damage action brought by a public official against a newspaper measures up to the standards stated in *Times v. Sullivan,* 376 U.S. 254, but must accept all evidence offered as true, draw all inferences as supporting proof of actual malice, and otherwise judge the proof in a light most favorable to sustaining adequacy of the proof of actual malice?

Question II.

Whether—in a libel damage action brought against a newspaper, its publisher and the author of an editorial published by the newspaper by a public official and candidate for re-election claiming to have been libeled because of an asserted false editorial opinion that a public proposal made by the public official that labor should sponsor "people's councils" to offset the influence of "special interests" in the Legislature in the opinion of the newspaper recommended an idea which had been proposed, sponsored and utilized by communists for infiltrating governments and seizing political power, since, in fact, the newspaper did not entertain any such opinion—admissions by the author that he did not believe the official was a communist or communist sympathizer and by the publisher that he didn't know whether the official was a communist or not, constituted a showing of knowing falsehood

judged by the standards of proof required by *Times v. Sullivan,* 376 U.S. 254, sufficient to support a finding that the newspaper, its publisher and the author of the editorial were actuated by "actual malice" in publishing the editorial?

Question III.

Whether, in a libel action as outlined in Question I, *supra,* it appearing without dispute that when the challenged editorial was written and published:

1. The public official—and candidate for re-election—in fact in a public speech at a labor convention had recommended that labor sponsor "people's councils" to offset the influence of "special interests" in the Legislature;

2. In fact the "people's council" idea historically and to the present time has been and is a commonly known communist technique used in infiltration of governments and ultimate seizure of political power—that the words "people's council" are almost words of art to one knowledgeable about communism as indicating that technique;

3. The author of the editorial was very knowledgeable about communism including the knowledge that innocent dupes among "left wingers" were often used by communists to advance their proposals;

4. The background of the official, to the knowledge of the author of the editorial, was that of a "left winger" who believed Russia's economic democracy superior to America "because big capital doesn't control it"; and who in public

speeches repeatedly, "savagely" and "brutally" attacked the Legislature as venal, other public officials as wrongfully extending financial favors to speculators and banks and insurance companies as greedy and oppressive of the public, a typical communist tactic in laying the groundwork for a "people's council" proposal;

did admissions by the author of the editorial and publisher of the newspaper of lack of belief that the official was in fact a communist or communist sympathizer constitute sufficient evidence to support a finding with "convincing clarity" that the Newspaper and its publisher and editor *knowingly* falsely stated that in the opinion of the newspaper the proposal made by the official was of an idea long associated with communists when in fact the Newspaper, its publisher and the editorial writer did not hold the opinion that the "people's council" idea referred to, or *reasonably could be read as referring to,* a communist device or technique?

Question IV.

Whether, assuming that a public proposal is made by a public official under such circumstances that it can be understood as making a recommendation which could seriously adversely affect the public legislature processes, a newspaper editor and publisher to avoid being exposed to a large libel damage verdict must:

(a) Assume that the public official really does not intend to recommend a dangerous idea even though members of the public may understand it as advocating a course injurious to the public, and avoid attacking the idea; or

(b) Make inquiry of the public official as to the sense in which he made the proposal and, if the official claims an innocuous meaning was intended, refuse to risk warning the public of the dangers inherent in acceptance of the proposal?

Question V.

Where the evidence in the case outlined in Question I, *supra,* was not in dispute:

(a) That Padev, the author of the editorial, was the Foreign Affairs Editor of Arizona Republic without any responsibilities in local matters, but undertook to research and write the editorial in question upon his own initiative and responsibility because of a strong personal reaction to the "people's council" idea of the Arizona Attorney General as a very dangerous idea; and

(b) That Eugene Pulliam had heard the radio reports of the "people's council" proposal and had read the two Phoenix Newspaper accounts of the speech and, as President of Phoenix Newspapers and publisher of Arizona Republic, the paper which published the editorial, personally reviewed the editorial prepared by Padev with Padev and based upon his complete confidence in Padev's knowledge of communism and his own considerable experience and knowledge of "people's councils" as a communist technique and practice, *on his sole responsibility,* and authority, *directed* publication of the editorial;

can a finding of "actual malice" on the part of Phoenix Newspapers, Inc., in publishing the editorial as directed by the publisher, Pulliam, be sustained if proof of

actual malice on the part of the publisher, Pulliam, falls short of meeting the standards of proof required by *Times?*

Question VI.

Whether the trial court's instructions to the jury in this case which gave the jury a correct instruction of the "actual malice" proof requirements as requested by appellants nonetheless denied appellants due process of law by also giving, over the objections of appellants, additional confusing instructions appropriate to a libel case not involving First Amendment rights and limitations such as the instruction by which the jury was instructed that actual malice might be found based on "a chain of circumstances from which the ultimate fact of actual malice is reasonably and naturally inferable with convincing clarity *from all the testimony and evidence introduced in this case?*" (Emphasis ours).

(Plaintiffs' Requested Instructions No. 1, No. 2A, No. 2B, No. 4, No. 7, Appendix to Appellants' Opening Brief, Court of Appeals, 61-66).

Concise Statement of the Case.

(a) How the Federal Questions Were Raised.

Prior to the retrial of the action in June, 1971, appellants had amended their answer to specifically allege their First Amendment defenses (Pages 11-18, Abstract of Record).

Again by Motion for Directed Verdict at the close of plaintiff's case in chief (R.T. 296-301) and at the close of all evidence (R.T. 569-575), appellants urged their defense of the failure of the evidence to meet First and Fourteenth Amendments to the United

States Constitution standards of required proof of "actual malice" as explicated in *Times v. Sullivan,* 376 U.S. 254.

In their Motion for Judgment n.o.v. appellants again urged the obligation of the court to give effect to the First Amendment rights of appellants and the court's duty to independently evaluate the evidence:

> "*New York Times* makes 'actual malice' a constitutional issue to be decided in the first instance by the trial judge, by way of a motion for summary judgment or for a directed verdict, applying the *Times* test of actual malice or reckless disregard of the truth."
>
> "Defendants (appellants) submit that, upon discharging its constitutional obligation to independently review this record, it will be abundantly clear to this Court that there was no sufficient evidence of either falsity or actual malice to warrant submission of those issues to the jury." (Appellants' Motion for Judgment n.o.v., Abstract of Record, pp. 50-113).

In their Motion for a New Trial, appellants (among other errors) urged the error of the court in denying appellants' Motion for a Directed Verdict based upon insufficiency of proof of actual malice (Abstract of Record, pp. 114-131).

Following the trial court's denial of appellants' Motion for a New Trial or for Judgment n.o.v., appellants filed a Special Action Petition with the Arizona Supreme Court making the claim that the trial court had failed to independently review the sufficiency of the evidence to support a finding of actual malice and had thereby abused and acted in excess of its jurisdiction. The Petition also brought to the attention

of the Arizona Supreme Court its obligation in its role as supervisor of the inferior courts to halt oppressive and harassing litigation involving freedom of the press and freedom of speech when the lack of merit in such litigation was properly brought to its attention.

The Arizona Supreme Court rejected the Petition and appellants sought relief in this Court by appeal which was dismissed.

Appellants raised the issue here presented as to the constitutional validity of the application of Rules, 50(a) and 50(b) ARCP, in their Opening Brief under the heading "Questions Presented", page 19, and at page 31 of their Reply Brief of Appellants brought its First Amendment constitutional responsibility to the attention of the Court of Appeals:

> "Appellants seriously question whether a state court appellate decision contravening a First Amendment right is controlling in subsequent litigation. We doubt a 'policy doctrine', court made, such as 'law of the case', can rise to the dignity of overriding a provision of the United States Constitution involving one of the great freedoms. We doubt the obligation arising from a state court Judge's oath of office requiring him as a judicial officer to support and uphold the Constitution of the United States can be thus lightly laid aside (Article 6, Sec. 26, Arizona Constitution). The duty explicated by the United States Supreme Court which requires that it refuse to be bound by the finding of a trial jury, despite the constitutional guarantee of trial by jury, and independently appraise the evidence as a fact-finding body to assure the integrity of the First Amendment freedoms, clearly points up the obligation which proper respect for these First Amendment guarantees requires of *all* judicial officers."

Following the Decision of the Court of Appeals in which it equated its responsibility for guarding appellants' First Amendment rights with the duty of finding merely that the evidence supported denial of appellants' Motion for a Directed Verdict, appellants in their Motion for Rehearing alleged:

> "3. The court erred in:
>
> "(a) Not itself independently and *de novo* reviewing the record to make sure the standards of proof mandated by the First and Fourteenth Amendments, as explicated in *Times v. Sullivan* and its progeny had been met in the trial court; and in
>
> "(b) Holding that the trial court was only required to review the evidence upon a Motion for a Directed Verdict and upon a Motion for Judgment Notwithstanding the Verdict in a light most favorable to the plaintiff."

"Appellants respectfully urge that the First and Fourteenth Amendments to the United States Constitution, as interpreted by the United States Supreme Court, plainly impose the duty upon the trial court and upon this court equally with a federal court to 'independently search this record' to make sure that the required proof of 'actual malice' has been made with 'convincing clarity'. The improper standard applied by the trial court (and impliedly by this court) in searching the record to make sure the *Sullivan* standards had been met, as a matter of law vitiates the judgment of the trial court and of this court."

ARGUMENT.

(a) The Federal Questions Are Substantial.

Appellant, Michael Padev, was born in 1915 in Bulgaria and grew to young manhood in that country where he entered the newspaper profession which has continued to hold his allegiance to this date.

As a young man, Padev spent time in a Nazi concentration camp where he first became acquainted with Bulgarian communist leaders. Padev escaped from Bulgaria prior to the communist takeover but he was tried and convicted "in absentia" by the communists after he had left Bulgaria and the communists had seized control because of his anti-communist writing. His elderly parents were imprisoned by the communists after Padev's conviction "in absentia" because they refused to renounce him.

Padev has written and lectured on communism since he began an intensive study of communism while a commentator for the British Broadcasting Company in 1947. He studied the history of the takeover by Communists in Russia and followed closely their activities in East Europe and the Far East, including Red China, following World War II.

Padev had studied the two-volume "Lusk" report to the New York Legislature "Revolutionary Radicalism, Its Purpose, History and Tactics" while in England, which exposed communist infiltration in the United States through formation of "people's councils" in the 1917-1920 period. Padev pointed out that (Chapter 7, p. 1,051) communist inspired people's councils were organized in the United States between 1917 and 1920 in 42 states, numbering 320 councils (R.T. 345).

Eugene C. Pulliam published newspapers in Indiana and Arizona. As a young journalist in 1917-1920 he learned of numerous communist-sponsored "people's councils" established from New York to California during this period. Pulliam travelled extensively after World War I and studied communism and its impact on people in the countries taken over by communists.

Pulliam met Padev in Germany, was impressed with his writing and knowledge of communism and employed Padev as Foreign Affairs Editor for the Arizona Republic. Padev came to Arizona in 1956. Pulliam considered Padev as one of the most knowledgeable men on communism he had known.

Padev first met appellee, Church, in the spring of 1959 when they both participated in a panel discussion on American Foreign Policy. At the conclusion of the discussion Padev and Church visited. Padev was shocked at the views Church expressed praising economic democracy in Russia "because big capital doesn't control it."

Subsequently, during Church's campaign for election as Attorney General, Padev followed Church's public statements and speeches in which Church consistently attacked the legislature as venal, the "vested interests", *i.e.*, the insurance and banking industries and the utilities as greedy, grasping, and oppressive of the public, quite often, as Padev expressed "savagely" and "brutally". He freely attacked other public officials, notably the State Land Commissioner. Padev testified that this approach was characteristic of communist preparation for proposing "people's councils" to remedy the asserted evil situation. Appellee did not dispute that Padev's

account of his attacks upon the legislature and other Arizona entities was accurate.

Church addressed a labor union convention in Flagstaff, Arizona, on May 7, 1959. Padev first heard reports of the speech on the radio and read accounts of it in the Republic and Gazette (both Phoenix Newspaper publications).

The newspaper accounts highlighted the attack Church made on the legislature and the "vested interests" and the fact he proposed that labor should take the lead in the formation of "people's councils" to pressure the legislature and offset the evil influence of the "vested interests". The texts of the radio broadcasts through which Padev first learned of the speech were not available but Padev recalled that they reported Church wanted the labor movement to organize a "people's council."

Appellee did not contest upon the trial that the people's council device is a recognized communist device or technique for infiltrating and ultimately seizing control of governments. In one of the newspaper stories, following his proposal that labor sponsor "people's councils" to offset managements' "third house" legislative tool, Church was reported as also recommending that labor join with P.T.A.s, Boy Scouts, etc. in employing lobbyists to influence legislation. Appellee contended —and indeed so did the Arizona Courts in arguing to uphold the jury verdict—that appellants should have realized that Church didn't really mean "people's councils" but instead referred to employing lobbyists. The one newspaper story which contained this reference cannot be reasonably read as connecting the "people's council" proposal with the suggestion that labor employ

lobbyists. Neither the appellee in testimony and argument, nor the Arizona Court in reading Mr. Church's proposal as a plainly innocuous suggestion that labor employ lobbyists, attached any significance to the fact appellee had otherwise, through his repeated and continuous brutal attacks upon Arizona governmental and other institutions, appeared to be adhering to the communist line, at least as Padev understood it.

Padev was "shocked" and "scared" at the fact the Attorney General of the state would propose an idea which Padev believed to be a recommendation that Arizona labor sponsor a communistic device and technique for infiltrating governments and seizing political power. Counsel for appellee, in his Opening Statement to the jury of the evidence appellee would present (R.T. Vol. I, p. 11) stated that appellee, Padev, reacted "hysterically" to Church's proposal.

Padev explained and documented his statements as to how communists work, that the "communist device of first condemning the local or the national legislature, the established form of government in very brutal terms" is found described "in almost every book on the communist take-over of governments" and that this is followed by "proposing a people's council" which "gradually dominates the legislature and then gradually takes over." It was this knowledge which caused Padev to react, as appellee's counsel expressed it "hysterically" to the proposal.

As Foreign Affairs Editor, local political matters were not within the scope of his editorial and writing responsibilities. However, because of his concern, Padev spent two to three days researching the literature

on communism and began writing the editorial in question, of his own volition.

Padev talked with Pulliam by phone after he had completed the editorial. Pulliam had also read the newspaper articles and heard the radio reports of the speech. Pulliam questioned Padev as to the fact "people's councils" were indeed communist infiltration devices and agreed that the idea Church had proposed was very dangerous and must be exposed. He approved the editorial because he had complete confidence in Padev and because of Pulliam's own knowledge of communism, and directed that the editorial be published. The editorial was plainly indentified as an "editorial", and was titled "Communism and Mr. Church", and was run on the front page of the Arizona Republic.

The editorial at its outset identified as its subject "the dangerous left-wing ideas of Attorney General Wade Church" exemplified by "his proposal for the setting up of a 'people's council' in Arizona."

The editorial then discussed the assertion by the Arizona Attorney General that the Arizona Legislature was dominated by "special interests" and that Church proposed that labor cause the selection of "people's councils" run by labor to tell the legislature what to do.

The editorial then traced the history of the "people's council" idea as sponsored by communists and identified it as of communistic origin.

It concluded by asking if Church advocated socialism or communism in Arizona and stating that Church owed the people of Arizona an explanation as to just what he did recommend.

Both Padev and Pulliam testified that they did not intend a personal attack on Church; that their sole purpose was to expose and destroy a "dangerous idea". There was no testimony as to whether or not either Padev or Pulliam gave any thought to or discussed if Church in fact was a communist.

Padev testified he presumed Church was not a communist; he didn't think he was a communist; Pulliam said, in effect, he didn't know. Their only discussion as reflected by the record was with respect to the fact Church's proposal in their opinion was a dangerous proposal with a history of communist utilization, often first advocated by innocent dupes.

Ralph de Toledano, a noted writer and commentator with long expertise in communism, for eleven years an editor of Newsweek and its expert on communism, testified, and there was no effort to disprove the testimony—that the use of the phrase "people's council" to one knowledgeable about communism is almost a phrase of art as referring to a communistic technique for infiltration of governments and for seizing political power.

Church had promptly sued appellants for libel and on the first trial the jury awarded Church a total of $50,000 as actual and punitive damages.

On appeal, the Arizona Supreme Court reversed for error in instructions but refused to direct a dismissal of the action. This Court denied certiorari (394 U.S. 959).

A judgment affirmed by the Court of Appeals, with accrued interest, now stands at an amount in excess of $600,000. It rests upon the adamant refusal

of the Arizona Courts to accept and apply the teaching of *Times v. Sullivan,* 376 U.S. 254, and related decisions of this Court explicating the guarantees of free speech and free press as assured by the First and Fourteenth Amendments to the United States Constitution.

The Arizona Courts have been unwilling to read and apply Rules 50(a) and 50(b), Arizona Rules of Civil Procedure, and Section 12-2102 A.R.S. as compatible with the standards, stated "with convincing clarity" in *Times* of the evidentiary support required to sustain a plaintiff's claim of "actual malice" sufficient to permit such plaintiff to prevail in an action brought by a public official as plaintiff, to recover damages from a newspaper publisher for an asserted libel.

Unless newspaper publishers and writers sued for damages for an asserted libel by a public official in the Arizona Courts are "second class citizens" entitled only to such crumbs from the *Times* standards of actual malice proof requirements as Arizona Courts may see fit to toss such defendants, substantial federal questions are presented.

All judges in the Arizona State Judicial System are required to take an oath of office requiring that such judge will support the Constitution of the United States. Article 6, Section 26, Arizona Constitution.

It is the obligation of the trial judges and the judges of the appellate courts of Arizona, equally with judges in the federal system, to reject interpretation and application of state statutes repugnant to the United States Constitution and to safeguard and protect the federal constitutional rights of litigants before them.

Irvin v. Dowd, 359 U.S. 394, 3 L.Ed.2d 900, 79 S.Ct. 825;

Mooney v. Holohan, 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340;

Robb v. Connolly, 111 U.S. 624, 637, 28 L.Ed 542, 4 S.Ct. 544.

The restriction placed upon trial judges by the Court of Appeals' ruling, and impliedly accepted as binding on it by the Court of Appeals in its consideration of the actual malice proof question, is incompatible with the test this Court has oft times repeated—requiring that the proof must be sufficient to justify a finding of "actual malice" with "convincing clarity" before a verdict against a newspaper publisher or writer may be permitted.

If the trial and appellate judges in reviewing the proof of actual malice are required to slant the evidence in favor of the plaintiff—even though in the independent judgment of such judges, this is unjustified; if judges are required to draw inferences in favor of the plaintiff which their intelligence and judgment rejects as not warranted and to believe implicitly all evidence not inherently improbable even though their experience and judgment would reject parts thereof, a determination under such restrictions that, to the mind of that judge, the evidence is sufficient to justify a finding of actual malice with "convincing clarity" is impossible. A mind is not "convinced" by evidence it rejects or by inferences it considers unwarranted.

> "It is now so well settled that the Court was able to speak in *Kern-Limerick Inc. v. Scurlock,* 347 U.S. 110, 121, 98 L.ed 546, 566, 74 S.Ct. 403, of the 'long course of judicial construction which establishes as a principle that the duty

> rests on this Court to decide for itself facts or construction upon which federal constitutional issues rest.' "
>
> *Napue v. Illinois,* 360 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (at 1222, 3 L.Ed.2d).

Disregard for one of a litigant's First Amendment "great freedoms" is outrageous and a violation of the constitutional guarantees involved whether it occurs at the state court's level or at the level of the highest court of the United States. A ruling by a state appellate court which sanctions a lesser concern for federal constitutional rights by a state court than the concern which such rights would excite in the federal system should be struck down.

Appellants respectfully urge that the questions presented are so substantial to require plenary consideration with briefs on the merits and oral arguments for their resolution.

Respectfully submitted,

MARK WILMER,
Counsel for Appellants.

APPENDIX.

Opinion.

In the Court of Appeals, State of Arizona, Division One.

Phoneix Newspapers, Inc., a corporation; Eugene C. Pulliam and Michael Padev, Appellants, v. Wade Church, Appellee. 1 CA-CIV 1990, Department B.

Appeal from the Superior Court of Maricopa County

Cause No. C-107395

The Honorable Warren L. McCarthy, Judge

AFFIRMED IN PART
REVERSED IN PART

Snell & Wilmer, by Mark Wilmer, Attorneys for Appellants, Phoenix, Arizona.

Goldstein, Mason, Bistrow & Ramras, Ltd., by Philip T. Goldstein, Phoenix, Arizona.

and

Tonkoff, Dauber & Shaw, Attorneys for Appellee, Yakima, Washington.

Filed: July 15, 1975.

HAIRE, Chief Judge, Division 1.

This appeal results from judgments entered in an action for damages for civil libel brought against a corporate defendant (Phoenix Newspapers, Inc.), its president and publisher (Eugene C. Pulliam) and its foreign affairs editor (Michael Padev). The plaintiff, the Attorney General of the State of Arizona, at the time of the alleged libel, claimed damages based

upon an editorial written by the defendant foreign affairs editor and published in the corporate defendant's newspaper with the approval of defendant Pulliam.

This is the second appeal in this matter. *See* PHOENIX NEWSPAPERS, INC. v. CHURCH, 103 Ariz. 582, 447 P.2d 840 (1968). The first trial resulted in a jury verdict and judgment against the defendants for $30,000 actual and $20,000 punitive damages. The defendants appealed from the first judgment and the Arizona Supreme Court reversed, holding that the instructions to the jury concerning actual malice did not comply with federal constitutional requirements enunciated in NEW YORK TIMES v. SULLIVAN, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964). Upon retrial, the jury awarded the plaintiff $250,000 actual damages and $235,000 punitive damages against each of the defendants.

Inasmuch as the evidence introduced during the second trial was in most respects substantially identical to that introduced in the first trial, we will not attempt to set forth the background facts pertinent to the libel claim. These facts have been stated in detail by the Arizona Supreme Court in its prior opinion, and the reader is referred to that opinion for the background facts essential to an understanding of this opinion.

On this appeal the defendants present some fourteen separate questions as a basis for reversal. Where appropriate, we will combine various of these questions for purposes of discussion.

THE ALLEGED MISCONDUCT OF PLAINTIFF'S COUNSEL

In the first three questions presented, defendants complain of assorted instances of alleged misconduct and prejudicial statements by counsel during the course of the trial and during jury argument. Defendants contend that, taken collectively, a pattern of intentional misconduct is shown which constitutes *fundamental* error effectively denying defendants a fair trial.

One of the complaints involved jury argument by defendants' counsel, who quoted as factual an alleged conversation between the publisher, Pulliam, and the foreign affairs editor, Padev, which never took place. Examples of such quoted fictitious statements are:

> "Mr. Pulliam, who was not a gentle man—he might be a gentleman, but not a gentle man, he said, 'Don't you let Marquardt write that editorial. I want you to indulge in the tactics that you well know is employed by the communists. I want you to pervert the truth in this case,'
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> 'I want you to write an editorial which will connect him up with communist philosophy. That is the surest way to end this Attorney General's career.'
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> "And without any consideration saying, 'Annihilate him, Padev. You adopt that arrogance—' that you saw demonstrated on the stand, refusal to abide or answer any questions, '—you pervert the truth in this case. That's another trait. In your godless way, annihilate him.' You have to teach the publishing company here."

Defendants complain that the foregoing statements were improper because of the lack of any evidentiary basis, and urge that they were highly inflammatory and prejudicial to the defendants. We tend to agree, although from our position it is difficult to assess the depth of the effect which these statements may have had on the jury. In this connection, we note that there was no objection to these statements at the time they were made, nor was there any request for a mistrial or for a curative instruction prior to the time the jury retired. Also, although the defendants filed a motion for a new trial, they did not raise any issue therein concerning these statements so as to give the trial judge an opportunity to consider their possible impact on the jury. For these reasons, we do not consider that, in and of themselves, these statements, although improper, constitute a sufficient basis for reversal.

Defendants also contend that fundamental error resulted from questions by plaintiff's counsel in the course of trial concerning the results of his campaign for re-election, despite the fact that the court had prior thereto ruled that the defeat of plaintiff was inadmissible. It is true that the trial judge instructed the jury that it should attach no significance to the fact that the plaintiff was not re-elected Attorney General. Although in their opening brief defendants refer to a ruling of the court that such evidence was inadmissible, no reference is made, in either the opening or reply briefs to the transcript relating to this ruling. Plaintiff asserts that no such ruling was made, and we have found none.

In addition to the foregoing, defendants also complain that plaintiff's counsel repeatedly misrepresented the substance of the allegedly libelous editorial to the jury by stating that the editorial in fact called the plaintiff a communist.

The record does reveal that plaintiff's counsel made such representations repeatedly, both in the form of questions while examining witnesses and during jury arguments. Typical examples are found in counsel's jury argument as follows:

> "You recall at the outset of this proceeding, when I addressed you, I told you that you must accept as a fact, or you must accept as a firm and conclusive hypothesis that the editorial, as a matter of law, charged Mr. Church with being a communist and advocating a communist sympathy dedicated to the violent overthrow of the democratic process. This you must start with.
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> "So in effect what this Court is telling you at the outset, and which you must accept as the gospel, is that this defendant newspaper, by the publication of this article, called this man a communist and ideologically sympathetic with the communist ideology of violent overthrow of our democratic institutions. What the law is saying is that there is no argument about this, because to call a man a communist, we say, is to cast him in the well of loneliness, is to cast him in a situation of opprobrium and, therefore, we say, as a fact, historically now, that to call a man a communist is to engage in licentious publication. That's what this case is about. I say

to you, ladies and gentlemen, that the defendant in this case forfeited its right to the protection and mantle of the First Amendment, and entered into the domain of licentious publication by calling this man a communist, especially when they did not believe that this man was a communist or was ideologically sympathetic with the communist way of life."

This Court recognizes that the editorial here involved did not in so many words directly label plaintiff a communist or a communist sympathizer. Such a conclusion, if to be drawn at all, must result from inferences drawn by the reader from the total contents of the editorial. However, plaintiff's counsel's remarks must be considered in the context of the prior rulings made in this case, with particular consideration being given to the Arizona Supreme Court's opinion on the prior appeal. In that opinion, one of the major issues discussed was whether the trial court had erroneously ruled prior to trial that the editorial was libelous per se. Over the defendant's strenuous contentions that, at most the editorial was susceptible of two meanings, one libelous and the other non-libelous, the Arizona Supreme Court upheld the trial court's ruling that the editorial was libelous on its face, that is, libelous per se.[1]

This holding constituted a finding that, as a matter of law, and without resort to evidence other than the face of the editorial, it was such as to bring plaintiff into disrepute, contempt, ridicule or to consti-

[1]The Arizona Supreme Court's opinion was not unanimous on this point—two justices dissented.

tute an impeachment of his honesty, integrity, virtue or reputation. ILITZKY v. GOODMAN, 57 Ariz. 216, 112 P.2d 860 (1941); BERG v. HOHENSTEIN, 13 Ariz. App. 583, 479 P.2d 730 (1971), 50 Am. Jur. 2d Libel and Slander, § 9. Even though this Court might have reached a contrary decision on this question, we are bound by the Arizona Supreme Court's prior determination. Being bound by that determination, we must examine the prior opinion to determine what the "libel" was that the Arizona Supreme Court found apparent on the face of the editorial. Did the Court find that the editorial libeled plaintiff by calling him a communist? We think not. A fair summary of Justice Lockwood's opinion on this point (concurred in by Justice McFarland) is that the editorial libeled plaintiff by charging him with communist sympathies, charging that he espoused a communist idea involving intimidation, blackmail and terrorism.[2] There is no support in Justice Lockwood's opinion for the position that the Court's ruling finding the editorial libelous per

[2]Justice Lockwood states:

"The insinuation that 'Mr. Church's idea,' embodies and approves of communist methods of intimidation, blackmail and terror, is so apparent here as to leave no room for argument.

* * *

"The whole thrust of the editorial is to link inseparably Wade Church and the idea of a 'people's council' to the communist 'people's council', thus charging him with espousing a communist doctrine involving intimidation, blackmail and terrorism. This is clearly no less than a charge of being in sympathy with communism in its lawless and violent aspects.

* * *

"It is absurd to assert that under such circumstances the editorial, as claimed by the defendants, merely attacked plaintiff's idea, and therefore was completely lacking in any accusation against plaintiff himself. It was basically a statement that plaintiff's attitude, expressed by his idea, was sympathetic with violent communist methods. 103 Ariz. at 588

se included a finding that, as a matter of law, it called plaintiff a communist. Justice Struckmeyer in his specially concurring opinion, although using different language, expressed basically the same idea as Justice Lockwood, again furnishing no support for plaintiff's assertion that the libelous per se ruling constituted a determination by the Court that the editorial called plaintiff a communist.[3]

When defendants' counsel objected during argument to plaintiff's continued assertions in this regard, the trial court ruled as follows:

> "The court will instruct the jury the article constitutes a libel per se, and the court will so define it."

In the context in which the ruling was given, it is very difficult to determine whether the trial judge, by the above-quoted ruling, intended to rule that, as

[3]Justice Struckmeyer states:

"These statements charge, not as an expression of opinion but as a positive assertion of fact, that Church proposed creating a people's council in Arizona to function just the way the councils that the Communist Party set up under Lenin functioned, they being formed for the purpose of intimidating, blackmailing and terrorizing legislatures and that this is the means of the Communists' seizure of power. It can only be understood to mean that Church was advocating the seizure of power through unlawful acts in the same manner as did the Communists, thereby destroying the democratic government of Arizona. The rhetorical question, 'Does he [Church] advocate Communism,' having already been answered by the previous purportedly factual statements, does not ameliorate the serious nature of the charges but serves rather to drive home to the reader the conclusion that Church was indeed advocating Communism.

"That parts of the editorial may be fairly susceptible of another or other interpretations, that is to say, are not libelous per se, does not detract from or exclude the clear charge that Church wished to operate in the same way as the Communists, by intimidation, blackmail and terror." 103 Ariz. at 598.

a matter of law, the editorial did call plaintiff a communist, or whether he was sustaining defense counsel's objection, thereby indicating that the "libelous per se" ruling did not constitute an instruction to the jury that the editorial called plaintiff a communist. An examination of the court's instructions on libel are equally as confusing on this point.[4] The only factual circumstance specified in the court's instruction as being libelous per se was the imputation to a person that he was *either a communist or a communist sympathizer.* This comment was followed by the court's preemptory instruction that ". . . The court finds as a matter of law, that the defendant's publication is libelous per se." In our opinion the natural conclusion which the jury would draw from the foregoing is that the

[4]The Court's instructions on libel were as follows:

"This present action is commonly known and termed a libel suit. For the purpose of this action, I define libel to you as every publication which tends to bring any person into disrepute, contempt, ridicule or tends to impeach his honesty or integrity, virtue or reputation as libelous per se. Per se meaning libelous in itself without other proof. I further instruct you that the word tend means to have influence toward producing a certain effect or to exert an influence. *I further instruct you that it would be libelous in itself or libelous per se to impute to a person that he is either a communist or is a communist sympathizer.*

"I instruct you that to render a statement libelous it is not necessary that the charge be made in a direct, positive or open manner. A mere insinuation may be as actionable as a positive assertion, if the meaning is plain. Likewise, the charge or reference may be made by way of asking a question, if the meaning is plain.

"I instruct you that the Court finds, as a matter of law, that the defendants' publication is libelous per se. That is, libelous in itself without proof on the part of plaintiff that said publication is libelous, and you are not to concern yourselves with this issue. All testimony and evidence admitted in this case relates to the remaining issues which are one, truth or falsity; two, actual malice, as will be herein defined, and three, damages." (Emphasis added).

trial judge did intend that the jury consider that, as a matter of law, the editorial called plaintiff a communist.

This conclusion leads us to a consideration of the question of what difference did all this make? Or, as stated by plaintiff's counsel in his answering brief, "in the context of this case, this [calling plaintiff a communist as opposed to stating that he espoused communist sympathies] was a distinction without a difference." However defendants' counsel argues that in the context of this case such a distinction was all important in view of the NEW YORK TIMES v. SULLIVAN test for actual malice. As stated by the United States Supreme Court in that decision:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, *with knowledge that it was*
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> *false* or with reckless disregard of whether it was false or not." 376 U.S. at 279-80 (Emphasis added).

If, as a matter of law, the editorial called plaintiff a communist, and if, as admitted by both defendants Pulliam and Padev in the first trial, neither believed that plaintiff was a communist, then it would conclusively follow that the editorial was published with the "actual malice" required under the TIMES test. This was the exact argument made by plaintiff's counsel to the jury.[5]

[5]Plaintiff's counsel argued as follows on the question of malice:

From the foregoing we conclude that plaintiff's counsel's conduct in this regard was erroneous and prejudicial. The question then arises as to whether defendants' counsel, by his repeated failure to object, has waived the right to urge this question on appeal. In reviewing defendants' motion for new trial, we note the following:

> "During his closing argument, plaintiff's counsel stated to the jury on several occasions that the Court had ruled, as a matter of law, that the editorial complained of was libelous per se because it called plaintiff a Communist. *Althoug'. the Court sustained defendants' objection that such argument was improper, the damage had already been done.*" (Emphasis added).

From the above, two conclusions can be drawn. First, it will be noted that defendants' counsel apparently felt at the time of trial that the trial judge's previously referred to ambiguous ruling did actually sustain his one and only objection. Second, counsel also felt that the damage had already been done by that time. Plaintiff's counsel further points out that defendants did not make any further efforts in this regard to cure any presumed prejudicial effect—counsel did not ask for an admonition by the trial judge to the jury; he did not ask for a mistrial out of the presence of the jury; nor did he request a curative instruction. The rule usually applicable to appellate review is recognized by both parties and needs no extensive citation

"What is the evidence? The evidence with convincing clarity came out of the defendants' own mouths. *They didn't believe that this man was a communist,* nor did he advocate the violent overthrow of our Legislature or our Government." (Emphasis added).

of authorities. This rule is stated in CITY OF PRESCOTT v. SUMID, 30 Ariz. 347, 247 P. 122 (1926) as follows:

> "That remarks of this nature were highly improper and beyond the legitimate limits of argument cannot be questioned, and appellate courts have frequently reversed cases for just such misconduct. It is nevertheless true that the usual practice requires objection to be made at the time, and that the court be requested to admonish the jury to disregard the improper conduct, or an appellate tribunal will not consider it. *Crumpton v. United States,* 138 U.S. 361, 34 L.Ed. 958, 11 Sup. Ct. Rep. 355 (see, also, Rose's U.S. Notes); *Rush v. French,* 1 Ariz. 99, 25 Pac. 816; 3 C.J. 862-864.
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> "The presumption is that an admonition to the jury by the court will remove the effect of the improper remarks. Unless, therefore, it appears that the misconduct was of so serious a nature that no admonition or instructions by the court could undo the damage, a failure to make timely objection is a waiver of error. *Scott v. Times-Mirror Co.,* 181 Cal. 345, 12 A.L.R. 1007, 18 Pac. 672; *In re Thomas,* 26 Colo. 110, 56 Pac. 907.
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> "Remarks made by counsel in the heat of argument are always taken by reasonable men 'cum grano salis,' and when their impropriety is called to the attention of the jury by the court, it is but rarely that harm results." 30 Ariz. at 355-356.

Notwithstanding the above, defendants contend that the total effect of the several alleged instances of misconduct of plaintiff's counsel were such as to require the trial judge, on his own motion, to step in and take curative action, citing among other decisions, BELFIELD v. COOP, 8 Ill. 2d 293, 134 N.E. 2d 249 (1956), wherein the Illinois Supreme Court stated:

> "If the argument of counsel is seriously prejudicial, a court should, of its own motion, stop the argument and direct the jury not to consider it. McWilliams v. Sentinel Publishing Co., 339 Ill. App. 83, 89 N.E. 2d 266; Rudolph v. City of Chicago, 2 Ill. App.2d 370, 119 N.E. 2d 528. If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon." 8 Ill.2d at 313, 134 N.E. 2d at 259.

We have reviewed the entire transcript in this matter, including the arguments of counsel, and do not find sufficient justification to hold that the trial judge should have taken positive action on his own motion in connection with the alleged instances of counsel's misconduct. In this connection we recognize that defense counsel's failure to object in many instances was no doubt dictated by strategic considerations—considerations that, given the posture of this particular case, the

nature of the subject matter and the identity of the parties, would, to many experienced practitioners, support the decisions which he made (without benefit of hindsight). However, in the absence of extreme factual circumstances which might justify the application of the principle stated in BELFIELD, *supra,* an appellate court cannot assume that the transgressions of plaintiff's counsel could not have been effectively cured by prompt trial court action initiated by appropriate efforts of opposing counsel at the trial level.

QUESTION NO. IV

ALLEGED ERROR IN LIBEL INSTRUCTIONS GIVEN AT PLAINTIFF'S REQUEST

At the request of plaintiff, and over defendants' objections, the court instructed the jury as follows:

PLAINTIFF'S REQUESTED INSTRUCTION NO. 1:

> "This present action is commonly known and termed a libel suit. For the purpose of this action, I define libel to you as every publication which tends to bring any person into disrepute, contempt, ridicule or tends to impeach his honesty or integrity, virtue or reputation as libelous per se. Per se meaning libelous in itself without other proof. I further instruct you that the word tend means to have influence toward producing a certain effect or to exert an influence. *I further instruct you that it would be libelous in itself or libelous per se to impute to a person that he is either a communist or is a communist sympathizer.*" (Emphasis added).

PLAINTIFF'S REQUESTED INSTRUCTION NO. 2A:

> "I instruct you that to render a statement libelous it is not necessary that the charge be made in a direct, positive or open manner. A mere insinuation may be as actionable as a positive assertion, if the meaning is plain. Likewise, the charge or reference may be made by way of asking a question, if the meaning is plain."

PLAINTIFF'S REQUESTED INSTRUCTION NO. 2B

> "I instruct you that the Court finds, as a matter of law, that the defendants' publication is libelous per se. That is, libelous in itself without proof on the part of plaintiff that said publication is libelous, and you are not to concern yourselves with this issue. * * *"

* * *

PLAINTIFF'S REQUESTED INSTRUCTION NO. 4:

> "You are instructed that the defendants' publication is to be construed by you in its ordinary and natural sense. You are to consider the publication in its entirety and to construe the sense of the words which appear in the publication and the ideas adopted in their plain and ordinary meaning as intended to be conveyed to persons of ordinary understanding."

Defendants complain that in view of the court's giving of Instruction 2B finding the publication libelous per se as a matter of law, portions of Instruction No. 1, all of Instruction 2A and all of Instruction 4, while possibly correct as abstract statements of the

law, were erroneously given and could only serve to create confusion in the minds of the jury. We agree that the last two sentences of plaintiff's Instruction No. 1 and all of plaintiff's Instruction 2A were erroneously given. By finding the publication libelous per se as a matter of law, the court removed this issue from the jury's consideration and thus there was no reason to give to the jury principles to guide their deliberations in this regard. However, immediately following the giving of plaintiff's Instruction 2B, the court instructed the jury:

> "All testimony and evidence admitted in this case relates to the remaining issues which are one, truth or falsity; two, actual malice, as will be herein defined; and three, damages."

Considering these instructions together, we cannot see how there could have been any substantial confusion created in the minds of the members of the jury by these instructions.

Turning now to plaintiff's Instruction No. 4, we first note that this instruction did not immediately follow the court's instructions on the libelous per se issue, but rather followed the court's instructions on actual malice. The question of actual malice had been left to the jury under appropriate instructions, and we perceive no error in the giving of plaintiff's Instruction No. 4 when considered in that context.

QUESTIONS NO. V AND VI
PLAINTIFF'S REQUESTED INSTRUCTION ON MALICE

In Question No. V defendants contend that the giving of plaintiff's requested Instruction 2A (quoted *supra*) contravenes TIMES v. SULLIVAN, by impliedly permitting the jury to find against the defendants on insinuation or based on asking a question. The argument is made that telling the jury that a mere insinuation may be as actionable as a direct statement and that the charge or reference may be made by a question impinges upon the standards of proof required by SULLIVAN. To the extent that this argument constitutes an attack upon the trial court's finding that the publication was libelous per se, we can only refer to our previous discussion of the Arizona Supreme Court's decision on the prior appeal and state that we are foreclosed from re-examining this issue. However, the thrust of defendants' argument appears to be related to the "confusion" arguments discussed in Question IV, *supra,* somehow urging that the instruction contravenes the SULLIVAN "clear and convincing evidence" or "with convincing clarity" tests for the proof of actual malice (discussed *infra*). We confess that we are unable to comprehend defendants' arguments in this regard, and therefore reject them.

Defendants phrased their Question VI as follows:

"VI

> "Whether Plaintiff's Requested Instruction No. 7, given as modified by the Court, which permitted the jury to find the appellants guilty of 'actual malice' from 'a chain of circumstances from which

the ultimate fact of actual malice is reasonably and naturally inferable with convincing clarity' constituted reversible error as permitting the jury to find 'actual malice' on the part of appellants by (a) a mere preponderance of the evidence, or (b) by an inference reasonably and naturally flowing from a chain of circumstances 'with convincing clarity'."

Plaintiff's Requested Instruction No. 7, as given, reads as follows:

"I instruct you that it is not necessary, and the plaintiff is not required, to prove actual malice on the part of the defendants by direct evidence. He may establish actual malice on the part of the defendants by a chain of circumstances from which the ultimate fact of actual malice is reasonably and naturally inferable with convincing clarity from all of the testimony and evidence introduced in the case."

It will be noted that Instruction No. 7 is essentially a circumstantial evidence instruction.

Defendants' attack on this instruction appears to be three-fold. First, defendants contend that it contravenes SULLIVAN in that it allows the jury to "find the fact ot actual malice by inference". Defendants make no reference to specific language in SULLIVAN, nor has this Court found anything in SULLIVAN which would indicate an intention to modify traditionally accepted rules relating to the type of proof required to show actual malice. In Arizona, even in criminal actions where the burden of proof is beyond a reasonable doubt, any supposed legal distinction be-

tween the probative value of direct and circumstantial evidence has been abolished. *See* STATE v. HARVILL, 106 Ariz. 386, 476 P.2d 841 (1970). The SULLIVAN test for malice, involving as it does the state of mind of the defendant concerning his knowledge of falsity, would indeed prove difficult to meet if limited to direct proof through admissions or statements made by the defendant. While the SULLIVAN court does impose a high standard of proof—by clear and convincing evidence—we find nothing to indicate an intention to limit evidence on this issue to that traditionally referred to as "direct evidence".

Defendants' second attack upon plaintiff's Instruction No. 7 appears to be based upon a burden of proof argument. Thus counsel states:

"Under this instruction the jury is permitted to find the 'circumstances' from which the malice is to be inferred by any standard of proof acceptable to them or by no standard at all."

Counsel then argues that each fact establishing the chain of circumstances leading to the inference of actual malice must be established by clear and convincing evidence, and that the instruction was therefore defective in only requiring that the ultimate fact of actual malice be inferable with convincing clarity. No citation of authority accompanies defendants' arguments on this point. While we find no decisions directly in point dealing with a "clear and convincing" standard of proof, we do find directly analogous decisions in the criminal law dealing with a "beyond a reasonable doubt" standard. These decisions establish that it is the ultimate issue or particular element of the crime which must be established beyond a reasonable doubt,

and not each circumstance or fact introduced into evidence. UNITED STATES v. HALL, 198 F.2d 726 (2d Cir. 1952); STATE v. PARIS, 43 Wash. 2d 498, 261 P.2d 974 (1953); STATE v. PACK, 106 Kan. 188, 186 P. 742 (1920); 30 Am. Jur. 2d, Evidence § 1172.

In our opinion this same principle is equally applicable to cases involving a "clear and convincing" standard of proof. We therefore reject defendants' attack on Instruction No. 7 in this regard.

As a final challenge to Instruction No. 7, defendants in their reply brief assert that there was no basis in the evidence for circumstantial evidence instruction on actual malice. We will not consider this argument in detail, inasmuch as the objection in the trial court was not made on this basis. Rule 51(a), Rules of Civil Procedure, 16 A.R.S.; WINCHESTER v. PALKO, 18 Ariz. App. 534, 504 P.2d 65 (1973); BROOKER v. CANNY, 103 Ariz. 529, 446 P.2d 929 (1968). We will say, however, that in our opinion there was circumstantial evidence bearing upon the issue of actual malice.

QUESTION NO. X

THE TRIAL COURT'S DUTY RE DEFENDANTS' DIRECTED VERDICT MOTIONS

Through their Question X, the defendants contend that the TIMES v. SULLIVAN clear and convincing standard of proof for actual malice requires that on a motion for directed verdict, the trial judge must make an independent determination as to whether there has been a showing of actual malice, and that in making such a determination he must weigh the evi-

dence, draw such inferences as he deems justified, and make his own determinations comparing the credibility of witnesses. This would be clearly contrary to the normal duty of the trial judge under well-established principles in Arizona law holding that on a motion for directed verdict the trial judge must view the evidence in a light most favorable to the opposing party, accepting the truth of whatever evidence he has introduced, together with all reasonable inferences to be drawn therefrom. DAVIS v. WEBER, 93 Ariz. 312, 380 P.2d 608 (1963); CITY OF PHOENIX v. BROWN, 88 Ariz. 60, 352 P.2d 754 (1960); JOSEPH v. TIBSHERANY, 88 Ariz. 205, 354 P.2d 254 (1960).

There is some support for defendants' contentions. *See* concurring opinion of Judge J. Skelly Wright in WASSERMAN v. TIME, INC., 424 F.2d 920 (D.C. Cir. 1970). However, in our opinion, the correct analysis of the TIMES v. SULLIVAN requirements in this regard is set forth in GUAM FEDERATION OF TEACHERS, LOCAL 1581, A.F.T. v. YSRAEL, 492 F.2d 438 (9th Cir. 1974). There the court considered the same argument being presented here, and held:

> "We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty

of the judge or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.

"The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the *New York Times* standard, the case is one for the jury, and it is error to grant a directed verdict, as the trial judge did in this case." 492 F.2d at 441. (Emphasis in original).

We therefore reject the contentions advanced by defendants on this issue.

QUESTIONS XI through XIV

LAW OF THE CASE AND SUFFICIENCY OF EVIDENCE RE "KNOWING FALSITY"[6]

In Questions XI through XIV defendants question the applicability of the law of the case doctrine on this appeal, insofar as concerns proof of falsity and defendants' knowledge of such falsity. In the Arizona

[6]In this opinion the use of the term "knowing falsity" or "knowledge of falsity" is intended to encompass the complete test of actual malice set forth in TIMES v. SULLIVAN and previously quoted in this opinion.

Supreme Court's opinion on the first appeal, there is specific language indicating a belief by that Court that the evidence in the first trial would have been sufficient to support a jury finding of knowing falsity, had the jury been properly instructed under the TIMES v. SULLIVAN test. Defendants contend that while the evidence presented at the first trial relating to this issue was substantially repeated in the second trial, there was also introduced new and important additional evidence which negated or made inappropriate the Arizona Supreme Court's prior findings.

Before proceeding further, it must be stated that when a libel is not directly stated, but rather depends upon inferences to be drawn by the reader, as in this case, it becomes difficult to apply the TIMES v. SULLIVAN test with any degree of precision. The difficulty is encountered because all of the facts directly stated in the allegedly libelous publication might well be true. Specifically as to this case, defendants have well summarized the issue as follows:

> "Since it was not disputed that Church [plaintiff] did recommend that labor sponsor 'people's councils' for the purpose stated and since it was not disputed that in fact 'people's councils' had been utilized as an infiltration device both in Europe and the United States, the impropriety charged to [defendants] must be that they claimed he was advocating a people's council of the communist kind when they knew he didn't intend that kind of organization."

In defendants' view, the only evidence presented which could arguably justify a submission to the jury

of this issue was the admission by defendant Padev, and the claimed admission by defendant Pulliam, that they did not believe that the plaintiff was a communist or a communist sympathizer. We do not agree that the evidence on this issue was quite so limited. The jury had before it the newspaper account of the plaintiff's speech which formed the basis for the writing of the editorial. There was extensive testimony concerning Padev's direct experience with, and study of, communist methods and ideology. In our opinion the jury was entitled to consider this evidence in arriving at a determination of whether the defendants necessarily knew that the plaintiff, in his Flagstaff speech, was not advocating a people's council of the kind and having the purpose defendant Padev described in the editorial. The Arizona Supreme Court in its prior opinion took the same view. Thus, Justice Lockwood stated:

> "To the extent that Padev was qualified to testify as to communist theory, institutions, and devices, the factual basis of the statements of the editorial regarding those subjects may be accepted. Yet this could not necessarily overcome the knowledge of falsity of the statements of fact as applied to what the plaintiff proposed in his speech, *as shown by the reportorial accounts immediately following it, and which both defendants Padev and Pulliam testified they had read before the editorial was published.*" (Emphasis added). 103 Ariz. at 595

And in Justice Stuckmeyer's specially concurring opinion:

> "The author of the editorial, Michael Padev, gained his information about Church's speech from

> a newspaper report, which is deserving of being requoted in part since, I believe, it is determinative of the question.
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> * * *
>
> "The newspaper account points out that what Wade Church meant by his use of the phrase 'people's council' was to 'hire full-time personnel to match lobbyists' with other interests. In representative government, lobbying is a lawful and accepted procedure for communicating the wishes of the electorate to the membership of legislatures. *No stretch of the imagination can equate this demoncratic process with the Communist technique for the seizure of power through intimidation, blackmail and terror. The editorial is not only false but the jury could have concluded that Padev must have known it was false.*" (Emphasis added) 103 Ariz. at 598-599.

It is true that on the re-trial new testimony was given relating to the function and practice of editorial writers who write commentary columns on political figures and public events. This evidence came from defendants Padev and Pulliam, and witness Ralph de Toledano. Defendants summarize this testimony as follows:

> "All three witnesses testified unequivocally that a news commentator and editorial writer does not as a matter of course (and necessity) consider whether or not a political figure who makes a public proposal in fact actually believes in and personally supports the proposal made. The proposal may be a 'trial balloon;' it may be a spur of the moment thought; or it may be that the

speaker simply got carried away by his own enthusiasm.

"Once the proposal is publicly made the function of the commentator or editorial writer is to attack it—commend it—ridicule it—or otherwise deal with it."

From the foregoing, defendants argue that if defendant Padev, in writing the editorial in question, as a professional news analyst and commentator routinely accepted the proposal as made by plaintiff Church as a "trial balloon" or as a thoughtless, spur-of-the-moment thing, or even as a rabble-rousing challenge to the "establishment" sort of thing, and proceeded to subject it to a bitter, caustic and devastating barrage of criticism, he was justified in so doing under the now firmly established principles of the law of libel in the area of free press, free speech within which the publication w made.

We agree with the defendant's basic premise that an editorial writer is not required to consider whether a political figure actually believes in and supports proposals which he might publicly make. However, in advancing their arguments, defendants ignore the fundamental issue in this case concerning the public proposal which was actually made by plaintiff, that is, did plaintiff, in his Flagstaff speech, advocate a people's council of the kind and having the purpose defendant Padev described in his editorial? If plaintiff's words were reasonably susceptible to the interpretation that plaintiff advocated a communist-type people's council, then plaintiff's personal undisclosed beliefs and defendants' knowledge or lack of knowledge of those

beliefs, would be immaterial in any libel action which plaintiff might file. Such reasoning is not applicable, however, where, as in this case, the fundamental basis of the plaintiff's complaint is that the defendants' editorial completely and falsely misrepresented the nature of the proposal actually stated by plaintiff.

In our opinion the evidence on the retrial was sufficient to justify the submission of the knowing falsity issue to the jury under the standards promulgated by TIMES v. SULLIVAN. Therefore we need not consider whether the law of the case doctrine in and of itself, would have required that this issue be submitted to the jury on the retrial.

QUESTIONS VII, VIII and IX

PLAINTIFF'S REQUESTED INSTRUCTION CONCERNING THE LIABILITY OF *ALL* DEFENDANTS

Plaintiff's Requested Instruction No. 19 was given by the trial court and reads as follows:

"You are further instructed that a corporation can only act through its agents, employees and officers. And in connection, I instruct you if you bring in a verdict in favor of the plaintiff, it must be against all defendants."

Defendants complain about that portion of the instruction which required the jury to find against *all* defendants if it found its verdict against any defendant. Defendants contend that under the TIMES v. SULLIVAN "actual malice" test, the jury could well have found that one or more of the defendants did not have the requisite knowledge of falsity, and therefore

would not have been liable, notwithstanding possible liability on the part of other defendants. We will discuss this contention as to each defendant separately.

As to the defendant corporation, it is contended that the doctrine of *respondeat superior* is "inapplicable as being over-ridden by the requirement of proof of actual malice." While this contention is somewhat broadly stated, we do not understand defendants' contention to be that under no circumstances can a corporate defendant employer be held liable for libel under the TIMES v. SULLIVAN test. Rather, the argument appears to be that defendant Pulliam had the ultimate authority to approve or disapprove the publishing of the editorial, and that in fact it was he who authorized its publication and it was upon his responsibility that it was published. It is then argued that if defendant Pulliam was free of actual malice then the defendant corporation, Phoenix Newspapers, Inc., could not be said to have been actuated by actual malice notwithstanding any malice which the trial court might find on the part of defendant Padev. In support of this position defendants cite the following language from TIMES v. SULLIVAN:

> "Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, *since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement.*" 376 U.S. at 287. (Emphasis added).

We do not find the same meaning in this language from TIMES v. SULLIVAN as is apparently discerned

by defendants. In the facts of personal participation. See authorities cited, 50 Am. Jur. 2d, Libel and Slander, §§ 335, 336. We question the legal soundness of these decisions. *See* FOLWELL v. MILLER, 145 F. 495 (2d Cir. 1906); KNOXVILLE PUB. CO. v. TAYLOR, 31 Tenn. App. 368, 215 S.W.2d 27 (1948). However, regardless of any prior validity which such a concept might have had, it is our opinion that it cannot survive the impact of the "actual malice" principles enunciated in TIMES v. SULLIVAN. We therefore start with the premise that under TIMES v. SULLIVAN, apart from the application of the doctrine of *respondeat superior*, an individual defendant cannot be held liable unless the jury finds that the individual himself has been actuated by actual malice (knowledge of falsity). Applying this principle to the case at hand, before defendant Pulliam could be held liable, the jury was required to find that he, himself, was actuated by actual malice (knowing falsity) when he participated with Padev in the activities culminating in the publication of the editorial. Plaintiff has presented no theory nor has he cited any authority under which any malice found on Padev's part could be imputed to the defendant Pulliam. The evidence on knowledge of falsity was not such that it was inherently applicable equally to both individual defendants on this issue, thereby requiring a finding that either both had knowledge of falsity or that neither had knowledge of falsity. Under the evidence the jury could well have found that defendant Padev had, and defendant Pulliam did not have, such knowledge.

Without going into a detailed review, there was evidence that Padev had written the editorial on his own initiative prior to any conversation with Pulliam, and that Pulliam authorized the publication of the

editorial with a much more limited knowledge of its actual contents than that possessed by Padev; that Padev was the foreign affairs editor of the newspaper and a recognized expert on communism; that because of Padev's expertise, Pulliam had complete confidence in his analysis and views concerning the people's council idea espoused by plaintiff. Further, the evidence in this trial as to Pulliam's knowledge and belief as to whether plaintiff was a communist was much weaker than that of Padev. Based upon this evidence, the jury might well have found that Pulliam did not have actual malice—that is, knowledge that the people's council proposal espoused by plaintiff was not similar or comparable to the people's council idea advocated by communists.

We therefore hold that the giving of Instruction No. 19 constituted reversible error as to defendant Pulliam.

We turn now to the question of whether the giving of Instruction No. 19 constituted reversible error as to the defendant Padev. From what we have previously stated in this opinion, it is obvious that a stronger case of actual malice (knowing falsity) was presented against Padev than was presented against Pulliam. Padev was the initiator and the writer of the editorial. He was the expert on communism. It was based upon his representations concerning people's councils that Pulliam authorized the publication of the editorial. Although the giving of the instruction may have constituted technical error as to Padev, it is difficult to see any prejudice to Padev from an instruction which in essence prohibited a verdict against him, unless a verdict was also returned against Pulliam, against whom a weaker case had been presented.

Counsel argues that the principal prejudice against defendant Padev arises from the fact that Instruction No. 19 requires a finding of liability on his part if liability is found on the part of two "target" defendants, that is, defendant Pulliam and defendant Phoenix Newspapers, Inc. As we have previously stated, any actual malice found on defendant Padev's part would be imputed to defendant Phoenix Newspapers, Inc., thereby automatically requiring a verdict against Phoenix Newspapers under such circumstances. Therefore, Instruction No. 19 was not erroneous insofar as it concerns the linking of defendants Padev and Phoenix Newspapers, Inc. for liability purposes.

As to defendant Pulliam's status as a "target" defendant, we find nothing in the record to support this contention.

The judgment of the trial court is affirmed as to defendants Padev and Phoenix Newspapers, Inc., and reversed as to defendant Pulliam.

/s/ Levi Ray Haire
LEVI RAY HAIRE
CHIEF JUDGE
DIVISION 1

CONCURRING:

/s/ Eino M. Jacobson
EINO M. JACOBSON
PRESIDING JUDGE
DEPARTMENT B

/s/ Jack L. Ogg
JACK L. OGG
JUDGE

Order.

In the Court of Appeals, State of Arizona, Division One.

Phoenix Newspapers, Inc., a corporation; Eugene C. Pulliam and Michael Padev, Appellants, v. Wade Church, Appellee. 1 CA-CIV 1990, DEPARTMENT B, MARICOPA County Superior Court No. C-107395.

Filed: September 11, 1975.

The motion for rehearing and the response thereto were considered by the Court, Presiding Judge Eino M. Jacobson and Judges Levi Ray Haire and Jack L. Ogg participating.

IT IS ORDERED denying the motion.

DATED this 11th day of September, 1975.

/s/ Eino M. Jacobson
EINO M. JACOBSON
PRESIDING JUDGE

A true copy of the foregoing order was mailed this 11th day of September, 1975, to:

Mr. Mark Wilmer, Snell & Wilmer, 3100 Valley Center, Phoenix, Arizona 85073, Attorneys for Appellants.

Mr. Philip T. Goldstein, Goldstein Mason & Ramras, Ltd., 1110 East McDowell Road, Phoenix, Arizona 85006, Attorneys for Appellee.

Supreme Court, State of Arizona, Phoenix 85007.
December 10, 1975

Phoenix Newspapers Inc., a corporation; Eugene C. Pulliam and Michael Padev, Appellants, vs. Wade Church, Appellee. Supreme Court, No. 12365-PR.

Court of Appeals, No. 1 CA-CIV 1990. Maricopa County, No. C-107395.

The following action was taken by the Supreme Court of the State of Arizona on December 9, 1975 in regard to the above-entitled cause:

"ORDERED: Petition for Review—DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 10th day of December, 1975.

CLIFFORD H. WARD, Clerk
By /s/ Mary Ann Hopkins
Deputy Clerk

To:

Mark Wilmer, Esq., Snell & Wilmer, 3100 Valley Center, Phoenix, Arizona 85073

Philip T. Goldstein, Esq., Goldstein, Mason & Ramras, 1110 East McDowell Road, Phoenix, Arizona 85006

Tonkoff, Dauber & Shaw, 616 Miller Building, Yakima, Washington 98901

Hon. Warren L. McCarthy, Judge Maricopa County Superior Court, 101 West Jefferson, Phoenix, Arizona 85003

Classie Gantt, Clerk, Court of Appeals, Division One, West Wing, State Capitol Building, Phoenix, Arizona 85007

West Publishing Company, 50 Kellogg Boulevard, St. Paul, Minnesota 55102.

Judgment.

In the Superior Court of the State of Arizona, in and for the County of Maricopa.

Wade Church, Plaintiff, vs. Phoenix Newspapers, Inc., an Arizona corporation, Eugene C. Pulliam, and Michael Padev, Defendants. No. 107395.

The above entitled and numbered cause came on regularly for trial on the 9th day of June, 1971, before the Honorable Warren L. McCarthy, Judge of the above entitled court, and the parties appeared by their respective counsel, and a jury, in accordance with the laws of the State of Arizona, was regularly empanelled and sworn to try said action, and witnesses on the part of the plaintiff and the defendants were sworn and examined, and documentary evidence was introduced by plaintiff and defendants; and after hearing the evidence, the arguments of counsel and instructions of the court, the jury retired to consider their verdict, and subsequently returned into court and the foreman announced that the jury had reached a verdict, and upon presentation to the court of a written form of verdict, the Clerk of the court read and announced that the jury, by its verdict, found for the plaintiff and against the defendants and assessed compensatory damages in the sum of $250,000.00 and fixed plaintiff's punitive damages in the sum of $235,000.00, and the verdict was received and recorded and those jurors who signed the same replied that it was their verdict, and thereafter the verdict was filed with the Clerk of the court, and by reason of the foregoing,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff, Wade Church, do have and recover judgment against the defendants Phoenix Newspapers, Inc., Eugene C. Pulliam and Michael Padev, and each of them, in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) as and for plaintiff's compensatory damages, together with the sum of Two Hundred Thirty-five Thousand Dollars ($235,000.00) as and for exem-

plary and punitive damages assessed against the defendants, and each of them, being in the aggregate Four Hundred Eighty-five Thousand Dollars ($485,000.00), with legal interest thereon from the date of the execution hereof.

DONE IN OPEN COURT this 21st day of June, 1971.

Warren L. McCarthy
Warren L. McCarthy
Judge of the Superior Court

(Verification of mailing copy).

"An Editorial

"COMMUNISM AND MR. CHURCH

"NOTHING ILLUSTRATES better the dangerous left-wing ideas of Attorney General Wade Church than his proposals for the setting up of a 'people's council' in Arizona.

"According to Church our legislature is 'dominated' by special interest groups operating from the Adams Hotel in Phoenix. For this reason the legislature does not reflect the will of the majority of the people, the attorney general argues. To 'correct' this situation Mr. Church proposes the selection of a 'people's council' which presumably, should tell the legislature what to do and how to do it. Mr. Church thinks that this 'people's council' should be organized and run by Arizona's labor unions.

"MR. CHURCH'S 'people's council' idea comes straight from the writings of Karl Marx, the god of 'scientific socialism' and the prophet of the international Communist movement. The same idea was the cornerstone of the philosophy of Lenin, the founder of the Soviet state. The same idea is the political basis of

all Communist regimes all over the world. The story of communism in power is essentially a story of the 'people's council' idea of government put into practice.

"When the Russian Czarist government fell apart early in 1917, the Russian democratic parties, which enjoyed the overwhelming support of the Russian people, formed democratically elected government organizations, including a central (federal) government responsible to an assembly (parliament).

"Later on the Russians elected a constituent assembly.

"In all these elected bodies the Communists had but a tiny and insignificant minority.

"But the Communists were not interested in votes—they never are. They were, as they are, interested in power alone.

"THE COMMUNIST PARTY, under Lenin, created its own 'people's councils,' which functioned independently of the government, just the way Wade Church wants the Arizona 'people's council' to function.

"These Russian 'people's councils' were supposed to consist of 'soldiers and sailors' and 'workers and peasants,' but were, in fact, dominated and manipulated by the Communists.

"It was these councils that played the most decisive role in the overthrow of the Russian national all-party government headed by the social democratic leader, Kerensky.

"It was these 'people's councils' that completed the destruction of the Russian 'bourgeois' (capitalist) state and imposed the Communist regime. The first Communist cabinet, headed by Lenin, was actually called

a people's council of commissars. In Russian the word 'soviet' means 'council,' and the Soviet government is quite properly called 'council government.'

"THE COMMUNISTS employed the same 'council' technique in East Europe, as well as in the Far East, including Red China. People's councils, at times called patriotic councils, national councils, anti-Fascist councils democratic councils, peace councils, and so on, were formed by the Communists everywhere with the sole purpose of 'guiding,' i.e. intimidating, blackmailing, and terrorizing the elected parliaments and district assemblies, which were not, at the beginning, Communist controlled.

"The 'people's council' idea is only another name for the Communist technique of the seizure of power and for the Communist way of enabling a small minority to control and eventually to rule the huge majority.

According to Communist theoreticians, from Marx and Lenin to Krushchev and Mao, only the 'advance guard' (the Communist leaders) of the 'working class' (the majority of the people) know how to interpret the 'historical laws of development' of our society.

"This supposedly enables the Communist leaders to know best what's good for the rest of us.

"Communists believe that they have the right and the duty 'to guide' the masses of humanity along the 'correct road' leading to socialism. The Communist-controlled 'people's councils' do this 'guidance' work with regard to the state.

"THE 'PEOPLE'S COUNCIL' idea of Attorney General Church is therefore nothing but a disguised Marxist idea of minority rule over the majority.

"We are certain that most Arizonans will resolutely reject Mr. Church's alarming conceptions of government.

"We also sincerely hope that the Arizona labor movement—at whose annual convention last week Mr. Church first voiced his 'people's council' proposal—will have the good sense to disassociate itself completely from such dangerous ideology, which can only do harm to the rank and file working man.

"BUT MR. CHURCH, himself, owes an urgent explanation to the public. He has to state, publicly and clearly, whether or not his 'people's council' proposals are part and parcel of a general Marxist philosophy of government and of life.

"Does Mr. Church advocate socialism for Arizona?

"Does he advocate communism?

"Does he want 'people's councils' to take over our state government in the way they have taken over the governments of all the unhappy lands behind the Communist Iron Curtain?"

3. DEFENDANTS' EXHIBIT 13 IN EVIDENCE
ARTICLE OF MAY 7, 1959—"LABOR URGED TO COMBAT 'THIRD HOUSE' "
By Bruce Kipp—Gazette Staff Writer

"Flagstaff, May 7—Atty. Gen. Wade Church advocates the creation of a 'people's council' to offset the effects of a 'third house' of the legislature through which, he says, management dominates the lawmaking in Arizona.

"The 50-year-old Phoenix Democrat provided the dessert for a banquet-barbecue-served delegates to the state AFL-CIO convention which concludes here today.

"Toting up a list of people's needs, which included his people's council and a second major newspaper for Phoenix, Church said 'if labor won't spearhead this movement, nobody will do it.

" 'If we don't do it, democracy as we conceive it and as our children learn it will not last in this state,' he said. 'And our children are going to live in a very shabby world.' "

. . . .

(The balance of this Exhibit is found on pages 10 through 13, Appendix to Appellants' Opening Brief).

4. PLAINTIFF'S EXHIBIT 15 IN EVIDENCE
ARTICLE—ARIZONA REPUBLIC
May 7, 1959

"CHURCH FLAYS LEGISLATURE'S 'THIRD HOUSE' "

"Flagstaff (Special)—Atty. Gen. Wade Church last night called for a 'people's council' to offset the special interest 'third house' which rules Arizona from Hotel Adams.

"He urged organized labor to join churches, PTAs, minority groups, and others and hire full-time personnel to match lobbyists with the mines, power group, construction industry, finance interests, and cattle groups.

"Addressing the Arizona State AFL-CIO convention, Church struck out at numerous influential Arizona groups.

" 'Power rates are exorbitant in this state,' declared Church. once secretary-treasurer of the old Arizona State Federation of Labor.

"State land is being sold to speculators for 7 per cent down and 38 years to pay and land is not being set aside for vital institutions, such as schools, Church continued.

"He rapped state laws which allow banks to keep millions of dollars of public money without paying the state interest. California, which gets bids for storing public money, get an average interest return of 3 per cent, compared to Arizona's 1 per cent,. Church asserted.

"And Church said there must be a second major newspaper in the Phoenix area. He said he hoped some paper like the Washington Post or St. Louis Post-Dispatch would come in and set up a paper in Phoenix, assuring the new venture of proper capitalization."

(A third Exhibit in evidence, newspaper releases, is found at pages 7 through 13 of the Appendix to Appellants' Opening Brief).

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1128

PHOENIX NEWSPAPERS, INC., a corporation;
and MICHAEL PADEV,

Appellants,

v.

WADE CHURCH,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS,
STATE OF ARIZONA, DIVISION ONE,
DEPARTMENT B.

MOTION TO DISMISS OR AFFIRM

PHILIP T. GOLDSTEIN
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Phoenix, Arizona 85006
Attorney for Appellee

GOLDSTEIN, MASON & RAMRAS, LTD.
1110 East McDowell Road
Phoenix, Arizona 85006

DATED: March 8th, 1976.

IN THE

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Appellee moves to dismiss the appeal for lack of jurisdiction under U.S.C. § 1257(2), or alternatively, to affirm on the ground that the federal questions presented are so insubstantial as not to justify further argument.

Should this Court treat the Jurisdictional Statement as a Petition for Writ of Certiorari, pursuant to 28 U.S.C. § 2103, it is respectfully submitted that such Petition should be denied.

OPINION BELOW

The Opinion of the Court of Appeals reported in 24 Ariz. App. 287, 537 P.2d 1345, and reproduced as a part of the Appendix to the Jurisdictional Statement has been printed with an inadvertent omission. We have reprinted the portion of the decision in which the omission occurs, identifying the omitted portion, as a part of the Appendix to this Motion.

In addition, the Opinion appealed from states:

> "Inasmuch as the evidence introduced during the second trial was in most respects substantially identical to that introduced in the first trial, we will not attempt to set forth the background facts pertinent to the libel claim. *These facts have been stated in detail by the Arizona Supreme Court in its prior opinion, and the reader is referred to that opinion for the background facts essential to an understanding of this opinion.*" (Emphasis supplied) (App. to Appellants' Jurisdictional Statement at 2).

We have printed as a part of our Appendix, the earlier Opinion of the Arizona Supreme Court reported at 103 Ariz. 582, 447 P.2d 840 (1968), thus incorporated by reference in the decision from which this appeal has been taken.

JURISDICTION

We do not believe that there was "drawn into question" in the courts below the constitutionality of Rules 50(a) and 50(b) of the Arizona Rules of Civil Procedure dealing with motions for a directed verdict, motions for judgment notwithstanding the verdict and motions for a new trial at the trial level. We also do not believe that there was "drawn into question" the constitutionality of A.R.S. § 12-2102 dealing with the review of the denial of such motions on appeal. *Cf. Baltimore & P.R. Co. v. Hopkins*, 130 U.S. 210,

9 S. Ct. 503, 32 L. Ed. 908 (1889).

The Arizona Rules are identical in pertinent part to the same numbered Federal Rules of Civil Procedure while the provisions of A.R.S. § 12-2102 set forth conventional rules regulating review of such determinations in appellate courts.

Appellants real point is not addressed to these Rules and Statute. It seems instead, to be that this Court's holding in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) requires trial and appellate courts to review the evidence as to actual malice *de novo* and in that connection, "weigh the evidence, draw such inferences as he deems justified, and make his own determinations comparing the credibility of witnesses." (App. to Appellants' Jurisdictional Statement at 20-21).

Nothing in the text of the Rules or the statute would inhibit such evaluation if the court believed that the *Times* case required it. What the Court below held was that:

> "This would be clearly contrary to the normal duty of the trial judge under well-established principles in Arizona law holding that on a motion for directed verdict the trial judge must view the evidence in a light most favorable to the opposing party, accepting the truth of whatever evidence he has introduced, together with all reasonable inferences to be drawn therefrom. DAVIS v. WEBER, 93 Ariz. 312, 380 P.2d 608 (1963); CITY OF PHOENIX v. BROWN, 88 Ariz. 60, 352 P.2d 754 (1960); JOSEPH v. TIBSHERANY, 88 Ariz. 205, 354 P.2d 254 (1960)." (App. to Appellants' Jurisdictional Statement at 21).

Thus, the court did not regard itself as ruling upon the procedural Rules or the statute, but instead, upon the settled practice of the Arizona Courts.

With respect to the substantive issue relating to the scope of review required by *Times v. Sullivan*, the Court stated:

"There is some support for defendants' contentions. See concurring opinion of Judge J. Skelly Wright in WASSERMAN v. TIME, INC., 138 U.S.App.D.C. 7, 424 F.2d 920 (D.C. Cir. 1970). However, in our opinion, the correct analysis of the TIMES v. SULLIVAN requirements in this regard is set forth in GUAM FEDERATION OF TEACHERS, LOCAL 1581, A.T.F. v. YSRAEL, 492 F.2d 438 (9th Cir. 1974). There the court considered the same argument being presented here, and held:

> " 'We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for directed verdict, or a motion for judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.
>
> " 'The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the *New York Times* standard, the case is one for the jury, and it is error to grant a directed verdict, as the trial judge did in this case.' 492 F.2d at 441. (Emphasis in original).

"We therefore reject the contentions advanced by defendants on this issue." (App. to Appellants' Jurisdictional Statement at 21-22).

Accordingly, the determination below did not rest on a

construction of the Rules or the Arizona Statute. It rested, instead, on the proposition that the federal law did not require a change of the practice of Arizona State Courts in reviewing the evidence on motions for a directed verdict or for a judgment notwithstanding the verdict.

COUNTERSTATEMENT OF THE CASE

On May 7, 1959, Wade Church, then Attorney General for the State of Arizona, delivered a speech in Flagstaff, Arizona, to the delegates of an AFL-CIO convention, condemning domination of the State Legislature by management's special interest groups.

The Arizona Supreme Court considered the most pertinent portions of this speech to be as follows:

> " '* * * I want to talk to you a little bit tonight about why labor is in politics in Arizona. I think there is a number of reasons. I think the first reason is because management is dominating the political scene in this state, and they have dominated it since 1912.
>
> * * * *
>
> " '* * * I think the first problem with reference to politics is the legislative control. Do you know that this legislature is controlled lock, stock and barrel by a third house that is not even elected by the people? They have a representative in the Hotel Adams that coordinates the work of all the special interest groups and you can't get a bill through unless you get their okay, and I am talking about the mining groups, and power groups, and the construction groups, and the finance groups, and the cattle groups. They are all coordinated, they have a regular *council*, and the astounding thing is that the legislation that is passed and okayed by this group.* * *
>
> " 'We, the people, what do we have to say about it? * * * Nothing, absolutely, nothing. * * * It just makes

you wonder whether or not the fundamental structure of our democratic order here in this state is going under, and I believe it is unless we take steps to change that.

* * * *

" 'Now, the working people and the people's groups are going to have to do *the same thing*. We are going to have to build a *council*. We are going to have to have *full-time representatives* up there at that legislature. We are going to have to watch it carefully. The P.T.A. ought to have them. The *Council of Churches* ought to have them, the labor groups ought to have two or three and those teachers, they are the ones that got a lot of brains, doggone them, they should be out there, too. * * *

" 'But the thing that worries me is this, that if we don't do it, Democracy as we conceive it and as our kids learn it in the schools, will no longer exist in this state. If we don't *match stride for stride* the careful painstaking job that these special interest groups do in presenting their viewpoints to the legislature, *ours and others*, if we don't match that with the *people's council*, we are dead as a dodo and Democracy dies with it. We will bury our Democratic Order. We can't afford any longer in this state to have these special interests running us. * * * If we don't do it, then our children are going to live in a very, very shabby world * * *. If the labor organizations don't spearhead this people's movement for a restoration of the basic democratic principles that our forefathers fought for, no one will do it, and I think once you take the labor movement out of our current system, we are dead. We are dead. And any hope for *anything other than a totalitarian state* is dead with it. * * *' " (Emphasis the Court's; App. hereto at A-8).

The Arizona Supreme Court also noted the manner in which the speech was reported by the Arizona Republic and Phoenix Gazette, the two newspapers published by the Appellant herein:

> "the day following, a news report of the speech appeared in the Arizona Republic and in part stated:

> " 'CHURCH FLAYS LEGISLATURE'S THIRD HOUSE
>
> " 'FLAGSTAFF (Special) - Atty. Gen. Wade Church last night called for a 'people's council' to offset the special interest 'third house' which rules Arizona from Hotel Adams.
>
> " 'He urged organized labor to join churches, PTA's, minority groups, and others and hire fulltime personnel to match *lobbyists* with the mines, power groups, construction industry, finance interests, and cattle groups. * * *'
>
> 'A similar news account was published in the Phoenix Gazette:
>
> " 'LABOR URGED TO COMBAT THIRD HOUSE'
>
> By Bruce Kipp, Gazette Staff Writer:
>
> 'FLAGSTAFF, May 7 - Atty. Gen. Wade Church advocates the creation of a 'people's council' to offset the effects of a 'third house' of the legislature through which, he says, management dominates the lawmaking in Arizona.
>
> " 'Toting up a list of people's needs, which included his people's council and a second major newspaper for Phoenix, Church said 'If labor won't spearhead the movement, nobody will do it.'
>
> " 'We're going to do exactly what these boys are doing - hire our own representatives to this people's council to counteract the lobbyists of the mines, railroads, and utilities which in turn, control the state. * * *' " (Emphasis the Court's; App. hereto at A-10).

Thereafter, there followed the accused editorial, printed in toto in Appellant's Appendix containing the accusation that Mr. Church's proposal was that of a communist people's council and concluding:

> " 'THE 'PEOPLE'S COUNCIL' idea of Attorney General Church is therefore nothing but a disguised Marxist idea of minority rule over the majority.
>
> " 'We are certain that most Arizonians will resolutely

reject Mr. Church's alarming conceptions of government.' " (App. to Appellants' Jurisdictional Statement at 37-38).

The Arizona Supreme Court also described the litigation events leading to the first appellate review of this case in 1968 as follows:

> "Plaintiff Church immediately filed his complaint for libel against Phoenix Newspapers, Inc., the publisher, Eugene Pulliam, and the editorial writer, Michael Padev, in the Superior Court for Maricopa County. On May 21 defendants published plaintiff's reply to the editorial rejecting the newspaper's 'opinions and inferences expressed' regarding his talk. Defendants Pulliam and Phoenix Newspapers, Inc., after unsuccessful motions to dismiss the complaint, filed their answer thereto on May 29, 1961. Plaintiff thereafter was granted leave to amend his complaint, and it is upon the amended complaint, and the subsequent answers of all defendants, that issues were joined. The case came on for trial April 29, 1963, and after a lengthy trial the jury entered a verdict for plaintiff in the sum of $30,000.00 compensatory damages and $20,000.00 punitive damages. From this verdict and judgment, and from orders denying defendants' motions to set aside the verdict and judgment, and motions for a new trial, defendants appeal." (App. hereto at A. 14).

Pending appeal this Court came down with its landmark decision in *New York Times v. Sullivan, supra*. The Arizona Supreme Court's reversal of the trial court because of the new federal rule was epitomized as follows:

> "We therefore hold that: the court did not err in ruling the editorial was libelous per se and in so instructing the jury, but that the instruction defining actual malice did not meet the required federal rule, and therefore requires that the case be reversed for a new trial." (App. hereto at A. 39).

As noted by the Arizona Court of Appeals on the second appeal, the evidence introduced during the second trial was

in most respects substantially identical to that introduced in the first trial. (App. to Appellants' Jurisdictional Statement at 2). The major difference between the two trials was that every effort was made by counsel and the Court to conform to the determinations of the Arizona Supreme Court and the "required federal rule."

As noted in Appellants' Statement of the Case, the judgment of the Superior Court of the State of Arizona was entered on the basis of a jury verdict in the sum of $485,000.00, The judgment was affirmed by the Arizona Court of Appeals and a Petition for Review with the Arizona Supreme Court was denied by that Court in an Order dated and entered December 9, 1975.

ARGUMENT

The Issues Raised by Appellants' Question I as to the Scope of Review are Insubstantial.

We have already noted that no question of constitutionality of a statutory procedural Rule or other statute is involved in this case. Accordingly, Question I raises only the issue whether the trial and appellate courts should in a case involving a media libel of a public official appraise the fact issue of actual malice as if acting as the trier of the fact.

As is also noted above, the court below relied upon *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael*, 492 F.2d 438 (9th Cir. 1974) for its determination that the trial court and appellate court was not required to give a review *de novo* deciding what inferences were to be drawn from the evidence in determining whether actual malice had been established.

Thus, the Opinion below on the one hand endorses the

proposition of *Guam* that the courts must review with care the evidence before them when confronted with an actual malice situation to avoid a chilling effect on First Amendment rights.

In the *Guam* case, the Ninth Circuit stated:

> "We agree with our brothers of the District of Columbia and Fifth Circuits that it is important that judges focus attention on the summary judgment, directed verdict and judgment notwithstanding the verdict procedures in libel actions. When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at these stages of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in a defendant's favor, provides a buffer against possible First Amendment inferences. The Supreme Court has instructed trial courts to 'examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' To be unprotected, actual malice must be shown with 'convincing clarity.' New York Times, supra, 376 U.S. at 285-286, 84 S.Ct. at 728-729." (492 F.2d at 441).

On the other hand, the Ninth Circuit and the Arizona Court of Appeals did not agree with the dictum of Judge J. Skelly Wright in which Judge Robinson concurred in *Wasserman v. Time, Inc.*, 138 U.S. App. D.C. 7, 9, 424 F.2d 920, 922-923 (1970), as to the requirements for Court review. In this respect, the Ninth Circuit stated:

> "However, with respect, we are not persuaded by the second phrase of Judge Wright's analysis in Wasserman which suggests that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom the motion for summary judgment, a

> motion for directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases, it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.
>
> "The standard against which the evidence must be examined is that of New York Times and its progeny. But the manner in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the New York Times standard, the case is one for the jury, and it is error to grant a directed verdict, as the trial judge did in this case." (492 F.2d at 441).

The Court then asserted "We do not think that the authorities on which Judge Wright relies sustain his thesis." (492 F.2d at 441). It proceeded to discuss the decisions of this Court upon which Judge Wright rested his dictum.

That discussion, too lengthy for quotation, amply demonstrates that this Court did not by *New York Times* and its progeny intend to set the issue of actual malice apart as an exception to time honored rules for appraising evidence in connection with motions for a directed verdict, for judgment notwithstanding verdict, or for a new trial. Accordingly, the federal question asserted to be raised is too insubstantial for further argument.

The Issues Raised by Appellants' Question II Arguing the Sufficiency of the Evidence as to Actual Malice are Insubstantial.

Appellants' discursive and argumentative presentation embodied in their Question II, basically inquires whether "admissions by the author that he did not believe the official was a communist or communist sympathizer and by the publisher that he didn't know whether the official was a communist or not, constituted a showing of knowing falsehood judged by the standards of proof required by *Times v. Sullivan*, 376 U.S. 254."

These matters were discussed by the Court below as follows:

> "In defendants' view, the only evidence presented which could arguably justify a submission to the jury of this issue was the admission by defendant Padev, and the claimed admission by defendant Pulliam, that they did not believe that the plaintiff was a communist or a communist sympathizer. We do not agree that the evidence on this issue was quite so limited. The jury had before it the newspaper account of the plaintiff's speech which formed the basis for the writing of the editorial. There was extensive testimony concerning Padev's direct experience with, and study of, communist methods and ideology. In our opinion the jury was entitled to consider this evidence in arriving at a determination of whether the defendants necessarily knew that the plaintiff, in his Flagstaff speech, was not advocating a people's council of the kind and having the purpose defendant Padev described in the editorial. The Arizona Supreme Court in its prior opinion took the same view. Thus, Justice Lockwood stated:
>
> " 'To the extent that Padev was qualified to testify as to communist theory, institutions, and devices, the factual basis of the statements of the editorial regarding those subjects may be accepted. Yet this could not necessarily overcome the knowledge of falsity of the statements of fact as applied to what the plaintiff proposed in his speech, *as shown by the reportorial accounts immediately following it, and which both defendants Padev and Pulliam testified they had read before the editorial was published.*' (Emphasis added) 103 Ariz. at 595, 447 P.2d at 853." (App. to Appellant's Jurisdictional Statement at 23-24)

It is thus apparent that appellants' argumentative presentation is incomplete. The Court below in fact made careful inquiry as to the sufficiency of the evidence and on that basis found that it supported the determination of actual malice under the rule of *Times v. Sullivan*.

It is not appropriate to ask this Court to review the evidence *de novo* in view of the studied evaluation of the evidence by the Court below, using the very standards which this Court has prescribed.

The Issues Raised by Appellants' Question III Again Arguing the Sufficiency of the Evidence as to Actual Malice are Insubstantial.

The gist of the lengthy argumentative and discursive presentation of fact embodied in Question III, appears to be contained in its final clause as follows:

> "[D]id admissions by the author of the editorial and publisher of the newspaper of lack of belief that the official was in fact a communist or communist sympathizer constitute sufficient evidence to support a finding with 'convincing clarity' that the Newspaper and its publisher and editor *knowingly* falsely stated that in the opinion of the newspaper the proposal made by the official was of an idea long associated with communists when in fact the Newspaper, its publisher and the editorial writer did not hold the opinion that the 'people's council' idea referred to, or *reasonably could be read as referring to*, a communist

device or technique?" (Appellants' Jurisdictional Statement at 9).

This question, under the principle of *Times v. Sullivan*, answers itself in the affirmative.

The comment of Justice Struckmeyer in the first decision of the Arizona Supreme Court does however, elucidate the basis for such an affirmative answer:

> "The jury, under the instructions of the trial court, found actual malice, malice in fact. I do not think it can reasonably be argued that there is insufficient evidence to sustain the verdict in this respect. The author of the editorial, Michael Padev, gained his information about Church's speech from a newspaper report. which is deserving of being requoted in part since, I believe, it is determinative of the question.
>
> " 'CHURCH FLAYS LEGISLATURE'S 'THIRD HOUSE'
>
> " 'FLAGSTAFF (Special) - Atty. Gen. Wade Chruch last night called for a 'people's council' to offset the special interest 'third house' which rules Arizona from Hotel Adams.
>
> " 'He urged organized labor to join churches, PTAs, minority groups, and others and hire full-time personnel to match lobbyists with the mines, power groups, construction industry, finance interests, and cattle groups.'
>
> "The newspaper account points out that what Wade Church meant by his use of the phrase 'people's council' was to 'hire full-time personnel to match lobbyists' with other interests. In representative government, lobbying is a lawful and accepted procedure for communicating the wishes of the electorate to the membership of legislatures. No stretch of the imagination can equate this democratic process with the Communist technique for the seizure of power through intimidation, blackmail and terror. The editorial is not only false but the jury could have concluded that Padev must have known it was false. From knowledgeable

> falsity or a reckless disregard of whether it was false, there can be inferred malice. New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686." (App. hereto at A. 41).

Nothing in the record suggests that the Court below did not apply correctly the standards applicable to a determination of actual malice in a media libel case as prescribed by this Court. Accordingly, the issues raised by Question III are insubstantial.

The Issues Raised by Question IV as to the Sufficiency of The Evidence are Insubstantial.

Question IV reads as follows:

> "Whether, *assuming that a public proposal is made by a public official under such circumstances that it can be understood as making a recommendation which could seriously adversely affect the public legislature process,* a newspaper editor and publisher to avoid being exposed to a large libel damage verdict must:
>
> (a) Assume that the public official really does not intend to recommend a dangerous idea even though members of the public may understand it as advocating a course injurious to the public, and avoid attacking the idea; or
>
> (b) Make inquiry of the public official as to the sense in which he made the proposal and, if the official claims an innocuous meaning was intended, refuse to risk warning the public of the dangers inherent in acceptance of the proposal?" (Appellants' Jurisdictional Statement at 9-10).

The Court of Appeals on the second appeal specifically dealt with this contention as follows:

> "We agree with the defendant's basic premise that an editorial writer is not required to consider whether a political figure actually believes in and supports proposals which he might publicly make. However, in

advancing their arguments, defendants ignore the fundamental issue in this case concerning the public proposal which was actually made by plaintiff, that is, did plaintiff, in his Flagstaff speech, advocate a people's council of the kind and having the purpose defendant Padev described in his editorial? If plaintiff's words were reasonably susceptible to the interpretation that plaintiff advocated a communist-type people's council, then plaintiff's personal undisclosed beliefs and defendants' knowledge or lack of knowledge of those beliefs, would be immaterial in any libel action which plaintiff might file. Such reasoning is not applicable, however, where, as in this case, the fundamental basis of the plaintiff's complaint is that the defendant's editorial completely and falsely misrepresented the nature of the proposal actually stated by plaintiff.

"In our opinion the evidence on the retrial was sufficient to justify the submission of the knowing falsity issue to the jury under the standards promulgated by TIMES v. SULLIVAN. Therefore we need not consider whether the law of the case doctrine in and of itself, would have required that this issue be submitted to the jury on the retrial." (App. to Appellants' Jurisdictional Statement at 26-27).

Again, the issues raised are too insubstantial to justify further review of this issue by this Court.

The Issue Raised by Appellants' Question V as to *Respondeat Superior* is Insubstantial.

Appellants' Question V raises the issue whether the actual malice of the author of the libelous editorial who was authorized to publish it for Phoenix Newspapers, Inc. by its President can be imputed to that corporation on the basis of *respondeat superior*.

We believe that this has been fully and properly answered by the court below and does not justify review by this Court. The Court below stated in pertinent part:

"Defendants contend that under the Times v. Sullivan 'actual malice' test, the jury could well have found that one or more of the defendants did not have the requisite knowledge of falsity, and therefore would not have been liable, notwithstanding possible liability on the part of other defendants.

• • • •

"In the facts in Times there was no employee having any responsibility in connection with the acceptance or publication of the allegedly libelous advertisement who knew the advertisement was false. Here both Padev and Pulliam were directly involved in the activities leading to the publication of the editorial, and as we have previously indicated in our opinion the evidence was sufficient to submit to the jury the issue of whether one or both of them had knowledge of its falsity. We find nothing in Times v. Sullivan or its progeny which would purport to change in any way well-settled principles of agency law making the employer liable for defamatory statements made by an employee acting within the scope of his employment. See Restatement of Agency Second, § 247.

"Under the facts of this case no sound argument can be made that defendant Padev's activities concerning the writing and publishing of the editorial were not within the scope of his employment with the defendant corporation. We therefore hold that actual malice on the part of either Pulliam or Padev would be imputed to the corporation as their employer." (App. hereto at A. 1).

The ruling of the Arizona Court of Appeals conforms to principles endorsed by this Court in *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 95 S. Ct. 465, 471 (1974). Accordingly, no substantial federal question was thereby raised.

The Issues Raised by Appellants' Question VI as to Circumstantial Evidence are Insubstantial.

Appellants' Question VI reads as follows:

"Whether the trial court's instructions to the jury in this case which gave the jury a correct instruction of the 'actual malice' proof requirements as requested by appellants nonetheless denied appellants due process of law by also giving, over the objections of appellants, additional confusing instructions appropriate to a libel case not involving First Amendment rights and limitations such as the instruction by which the jury was instructed that actual malice might be found based on 'a chain of circumstances from which the ultimate fact of actual malice is reasonably and naturally inferable with convincing clarity *from all the testimony and evidence introduced in this case*.' (Emphasis ours)." (Appellants' Jurisdictional Statement at 11).

The court below carefully reviewed all the instructions and concluded that neither error nor confusion resulted therefrom. (App. to Appellants' Jurisdictional Statement at 16).

With respect to the specific matter of Instruction No. 7 dealing with circumstantial evidence, the Court stated:

"Plaintiff's Requested Instruction No. 7, as given, reads as follows:

> " 'I instruct you that it is not necessary, and the plaintiff is not required, to prove actual malice on the part of the defendants by direct evidence. He may establish actual malice on the part of the defendants by a chain of circumstances from which the ultimate fact of actual malice is reasonably and naturally inferable with convincing clarity from all of the testimony and evidence introduced in the case.'

"It will be noted that Instruction No. 7 is essentially a circumstantial evidence instruction.

" * * * First, defendants contend that it contravenes SULLIVAN in that it allows the jury to 'find the fact

of actual malice by inference'. Defendants make no reference to specific language in SULLIVAN, nor has this Court found anything in SULLIVAN which would indicate an intention to modify traditionally accepted rules relating to the type of proof required to show actual malice. In Arizona, even in criminal actions where the burden of proof is beyond a reasonable doubt, any supposed legal distinction between the probative value of direct and circumstantial evidence has been abolished. See STATE v. HARVILL, 106 Ariz. 386, 476 P.2d 841 (1970). The SULLIVAN test for malice, involving as it does the state of mind of the defendant concerning his knowledge of falsity, would indeed prove difficult to meet if limited to direct proof through admissions or statements made by the defendant. While the SULLIVAN court does impose a high standard of proof - by clear and convincing evidence - we find nothing to indicate an intention to limit evidence on this issue to that traditionally referred to as 'direct evidence.'

"Defendants' second attack upon plaintiff's Instruction No. 7 appears to be based upon a burden of proof argument. Thus counsel states:

> " 'Under this instruction the jury is permitted to find the 'circumstances' from which the malice is to be inferred by any standard of proof acceptable to them or by no standard at all.'

"Counsel then argues that each fact establishing the chain of circumstances leading to the inference of actual malice must be established by clear and convincing evidence, and that the instruction was therefore defective in only requiring that the ultimate fact of actual malice be inferable with convincing clarity. No citation of authority accompanies defendants' arguments on this point. While we find no decisions directly in point dealing with a 'clear and convincing' standard of proof, we do find directly analogous decisions in the criminal law dealing with a 'beyond a reasonable doubt' standard. These decisions establish that it is the ultimate issue or particular element of the crime which must be established beyond a reasonable doubt

and not each circumstance or fact introduced into evidence. UNITED STATES v. HALL, 198 F.2d 726 (2d Cir. 1952); STATE v. PARIS, 43 Wash.2d 498, 361 P.2d 974 (1953); STATE v. PACK, 106 Kan. 188, 186 P. 742 (1920); 30 Am.Jur.2d, Evidence § 1172.

"In our opinion this same principle is equally applicable to cases involving a 'clear and convincing standard of proof.' We therefore reject defendants' attack on Instruction No. 7 in this regard." (App. to Appellants' Jurisdictional Statement at 18-20).

Again the question here raised does not warrant the review of this Court.

CONCLUSION

Appellants cannot establish jurisdiction in this Court to hear this Appeal. In any event, the federal questions raised are so insubstantial that if jurisdiction were assumed the order below should be affirmed without further argument.

Should the Court treat the Jurisdictional Statement as a Petition for Certiorari, the Petition, for the same insubstantiality of the federal questions claimed to be raised should be denied.

Respectfully submitted,
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March, 1976.

TABLE OF AUTHORITIES CITED

APPENDIX

Portion of Opinion and Judgment of Court of Appeals Dated July 15, 1975, as to which there is an inadvertent omission in Appendix to Appellants' Jurisdictional Statement.

"QUESTIONS VII, VIII and IX

PLAINTIFF'S REQUESTED INSTRUCTION CONCERNING THE LIABILITY OF ALL DEFENDANTS

Plaintiff's Requested Instruction No. 19 was given by the trial court and reads as follows:

> "You are further instructed that a corporation can only act through its agents, employees and officers. And in connection, I instruct you if you bring in a verdict in favor or [sic] the plaintiff, it must be against all defendants."

Defendants complain about that portion of the instruction which required the jury to find against *all* defendants if it found its verdict against any defendant. Defendants contend that under the Times v. Sullivan "actual malice" test, the jury could well have found that one or more of the defendants did not have the requisite knowledge of falsity, and therefore would not have been liable, notwithstanding possible liability on the part of the other defendants. We will dicsuss this contention as to each defendant separately.

As to the defendant corporation, it is contended that the doctrine of *respondeat superior* is "inapplicable as being overridden by the requirement of proof of actual malice." While this contention is somewhat broadly stated, we do not understand defendants' contention to be that under no circumstances can a corporate defendant employer be held liable for libel under the Times v. Sullivan test. Rather, the argument appears to be that defendant Pulliam had the ultimate

authority to approve or disapprove the publishing of the editorial, and that in fact it was he who authorized its publication and it was upon his responsibility that it was published. It is then argued that if defendant Pulliam was free of actual malice then the defendant corporation, Phoenix Newspapers, Inc., could not be said to have been actuated by actual malice notwithstanding any malice which the trial court might find on the part of defendant Padev. In support of this position defendants cite the following language from Times v. Sullivan:

> "Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, *since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement.*" 376 U.S. at 287, 848 S.Ct. at 730 (Emphasis added).

We do not find the same meaning in this language from Times v. Sullivan as is apparently discerned by defendants. In the facts *in** *Times there was no employee having any responsibility in connection with the acceptance or publication of the allegedly libelous advertisement who knew the advertisement was false. Here both Padev and Pulliam were directly involved in the activities leading to the publication of the editorial, and as we have previously indicated in our opinion the evidence was sufficient to submit to the jury the issue of whether one or both of them had knowledge of its falsity. We find nothing in Times v. Sullivan or its progeny which would purport to change in any way*

*Beginning of omitted portion of Opinion.

well-settled principles of agency law making the employer liable for defamatory statements made by an employee acting within the scope of his employment. See Restatement of Agency Second, § *247.*

Under the facts of this case no sound argument can be made that defendant Padev's activities concerning the writing and publishing of the editorial were not within the scope of his employment with the defendant corporation. We therefore hold that actual malice on the part of either Pulliam or Padev would be imputed to the corporation as their employer. It follows that as to the defendant Phoenix Newspapers, no error was committed by the giving of Instruction No. 19 since the jury could not find against either Pulliam or Padev without being required to find against their employer, Phoenix Newspapers, Inc.

*We next consider the propriety of Instruction No. 19 insofar as concerns defendant Pulliam. He was the president of the defendant corporation which owned the newspaper, and, as previously stated, exercised overall control of its editorial policies. Defendant Padev, while subject to the overall control and authority of defendant Pulliam, was an employee of the defendant corporation. Although not cited by plaintiffs, we do find some authority which would support a holding that under these circumstances a defendant in Pulliam's position could be held equally liable with the owner, defendant Phoenix Newspapers, Inc., for the publication therein of a libelous editorial, even in the absence of evidence.*** of personal participation. See authorities cited, 50 Am.Jur.2d, Libel and Slander, § § 335, 336. We question the legal soundness of these decisions. *See* Folwell v. Miller, 145

**End of omitted portion of Opinion.

F. 495 (2d Cir. 1906); Knoxville Pub. Co. v. Taylor, 31 Tenn. App. 368, 215 S.W.2d 27 (1948). However, regardless of any prior validity which such a concept might have had, it is our opinion that it cannot survive the impact of "actual malice" principles enunciated in Times v. Sullivan. We therefore start with the premise that under Times v. Sullivan, apart from the application of the doctrine of *respondeat superior*, an individual defendant cannot be held liable unless the jury finds that the individual himself has been actuated by actual malice (knowledge of falsity). Applying this principle to the case at hand, before defendant Pulliam could be held liable, the jury was required to find that he, himself, was actuated by actual malice (knowing falsity) when he participated with Padev in the activities culminating in the publication of the editorial. Plaintiff has presented no theory nor has he cited any authority under which any malice found on Padev's part could be imputed to the defendant Pulliam. The evidence on knowledge of falsity was not such that it was inherently applicable equally to both individual defendants on this issue, thereby requiring a finding that either both had knowledge of falsity or that neither had knowledge of falsity. Under the evidence the jury could well have found that defendant Padev had, and defendant Pulliam did not have, such knowledge.

Without going into a detailed review, there was evidence that Padev had written the editorial on his own initiative prior to any conversation with Pulliam, and that Pulliam authorized the publication of the editorial with a much more limited knowledge of its actual contents than that possessed by Padev; that Padev was the foreign affairs editor of the newspaper and a recognized expert on communism; that because of Padev's expertise, Pulliam had complete

confidence in his analysis and views concerning the people's council idea espoused by plaintiff. Further, the evidence in this trial as to Pulliam's knowledge and belief as to whether plaintiff was a communist was much weaker than that of Padev. Based upon this evidence, the jury might well have found that Pulliam did not have actual malice—that is, knowledge that the people's council proposal espoused by plaintiff was not similar or comparable to the people's council idea advocated by communists.

We therefore hold that the giving of Instruction No. 19 constituted reversible error as to defendant Pulliam.

We turn now to the question of whether the giving of Instruction No. 19 constituted reversible error as to the defendant Padev. From what we have previously stated in this opinion, it is obvious that a stronger case of actual malice (knowing falsity) was presented against Padev than was presented against Pulliam. Padev was the initiator and the writer of the editorial. He was the expert on communism. It was based upon his representations concerning people's councils that Pulliam authorized the publication of the editorial. Although the giving of the instruction may have constituted technical error as to Padev, it is difficult to see any prejudice to Padev from an instruction which in essence prohibited a verdict against him, unless a verdict was also returned against Pulliam, against whom a weaker case had been presented.

Counsel argues that the principal prejudice against defendant Padev arises from the fact that Instruction No. 19 requires a finding of liability on his part if liability is found on the part of two "target" defendants, that is, defendant Pulliam and defendant Phoenix Newspapers, Inc. As we have

previously stated, any actual malice found on defendant Padev's part would be imputed to defendant Phoenix Newspapers, Inc., thereby automatically requiring a verdict against Phoenix Newspapers under such circumstances. Therefore, Instruction No. 19 was not erroneous insofar as it concerns the linking of defendants Padev and Phoenix Newspapers, Inc. for liability purposes.

As to defendant Pulliam's status as a "target" defendant, we finding nothing in the record to support this contention.

The judgment of the trial court is affirmed as to defendants Padev and Phoenix Newspapers, Inc., and reversed as to defendant Pulliam.

JACOBSON, P. J., and OGG, J., concurring."

PHOENIX NEWSPAPERS, INC., a corporation; Eugene C. Pulliam and Michael Padev, Appellants,

v.

Wade CHURCH, Appellee

No. 8122.

Supreme Court of Arizona.

In Banc.

Nov. 27, 1968.

Rehearing Denied Dec. 24, 1968.

Libel action arising out of publication of newspaper editorial. The Superior Court, Maricopa County, Warren L. McCarthy, J., found for plaintiff and defendant appealed. The Supreme Court, Lockwood, J., held that editorial which stated that attorney general's suggestion was political basis of communist regimes and went on to explain how communists employed such suggestions to seize power was libelous per se but that instruction in libel action that actual malice may be inferred from wrongful motive in publication of matter, or from absence of proper caution, or want of proper justification, or lack of good faith was fatally defective.

Reversed and remanded with directions.

Udall, V. C. J., dissented in part.

Bernstein, J., dissented.

• • • •

Gust, Rosenfeld & Divelbess, Snell & Wilmer, by Mark Wilmer, Phoenix, for appellants.

Liebsohn, Goldstein & Weeks, by Philip T. Goldstein, Phoenix, for appellee.

LOCKWOOD, Justice:

Appellee Wade Church was Attorney General of the State

of Arizona at the time of the commencement of this suit for libel on May 11, 1959. His claim was based upon an alleged libelous editorial which appeared on the front page of the *Arizona Republic*, one of two daily newspapers published by appellant, Phoenix Newspapers, Inc. Appellant Eugene C. Pulliam was, and is, president and publisher of the corporate defendant; appellant Michael Padev was the author of the editorial by which appellee claims he was libeled.

The events preceding the publication of the editorial were the following:

On May 7, 1959, Mr. Church delivered a speech in Flagstaff, Arizona to the delegates of an AFL-CIO convention. The speech was not given from a prepared text but rather from notes; it was tape recorded, later transcribed, and produced in court by the defendants. Some of the pertinent portions of that speech which appear in the record are as follows:

> "* * * I want to talk to you a little bit tonight about why labor is in politics in Arizona. I think there is a number of reasons. I think the first reason is because management is dominating the political scene in this state, and they have dominated it since 1912.
>
> * * * * * *
>
> "* * * I think the first problem with reference to politics is the legislative control. Do you know that this legislature is controlled lock, stock and barrel by a third house that is not even elected by the people? They have a representative in the Hotel Adams that coordinates the work of all the special interest groups and you can't get a bill through unless you get their okay, and I am talking about the mining groups, and the power groups, and the construction groups, and the finance groups, and the cattle groups. They are all coordinated, they have a regular *council*, and the astounding thing is that the legislation that is passed is passed and okayed by this group. * * *
>
> "We, the people, what do we have to say about it? * * * Nothing, absolutely nothing. * * * It just makes you wonder whether or not the fundamental structure of our democratic order here in this state is going under, and I believe it is unless we take steps to change that." (Emphasis ours.)

Mr. Church proceeded to cite certain problems which existed in the state, and noted with regard to a need for equalization of educational opportunities, that

> "* * * That bill [a property evaluation bill] was lobbied through the legislature by the representative of the railroad group, it was his job. This *council* selected him to whip that through the legislature, you know. I saw him, he told me. And it is his job now to see that there is a representative of this unseen government before every County Board of Supervisors to make sure there is not too much money given the schools * * *. But nevertheless there you have a piece of special legislation that demonstrates that our legislature is run by a third house with headquarters in the Hotel Adams. I think it is a disgrace and we are going to have to do something about it. * * *". (Emphasis ours.)

He cited other problems which he thought should be solved by representative legislation and then stated:

> "Now, the working people and the people's groups are going to have to do *the same thing*. We are going to have to build a *council*. We are going to have to have *full-time representatives* up there at that legislature. We are going to have to watch it carefully. The *P.T.A.* ought to have them. The *Council of Churches* ought to have them, the labor groups ought to have two or three and those teachers, they are the ones that got a lot of brains, doggone them, they should be out there, too. * * *.
>
> * * * * * *
>
> "But the thing that worries me is this, that if we don't

do it, Democracy as we conceive it and as our kids learn it in the schools, will no longer exist in this state. If we don't *match stride for stride* the careful painstaking job that these special interest groups do in presenting their viewpoints to the legislature, *ours and others*, if we don't match that with the *people's council*, we are dead as a dodo and Democracy dies with it. We will bury our Democratic Order. We can't afford any longer in this state to have these special interests running us. * * * If we don't do it, then our children are going to live in a very, very shabby world * * *. If the labor organizations don't spearhead this people's movement for a restoration of the basic democratic principles that our forefathers fought for, no one will do it, and I think once you take the labor movement out of our current system, we are dead. We are dead. And any hope for *anything other than a totalitarian state* is dead with it. * * *" (Emphasis ours.)

The day following, a news report of the speech appeared in the *Arizona Republic* and in part stated:

"CHURCH FLAYS LEGISLATURE'S THIRD HOUSE

"FLAGSTAFF (Special)—Atty. Gen. Wade Church last night called for a 'people's council' to offset the special interest 'third house' which rules Arizona from Hotel Adams.

"He urged organized labor to join churches, PTA's, minority groups, and others and hire fulltime personnel to match *lobbyists* with the mines, power groups, construction industry, finance interests, and cattle groups. * * *"

A similar news account was published in the *Phoenix Gazette*:

"LABOR URGED TO COMBAT 'THIRD HOUSE'

By Bruce Kipp, Gazette Staff Writer

"FLAGSTAFF, May 7—Atty. Gen. Wade Church advocates the creation of a 'people's council' to offset the effects of a 'third house' of the legislature through which,

he says, management dominates the lawmaking in Arizona.

* * * * * *

"Toting up a list of people's needs, which included his people's council and a second major newspaper for Phoenix, Church said 'if labor won't spearhead this movement, nobody will do it.'

* * * * * *

"We're going to do exactly what these boys are doing—hire our own representatives to this people's council to counteract the lobbyists of the mines, railroads, and utilities which, in turn, control the state. * * *."

Subsequently, on May 11, 1959 an editorial, prominently placed on the front page, rather than on the editorial pages, appeared in the *Arizona Republic*. This editorial, the subject of plaintiff's suit for libel, states the following:

"An Editorial

"COMMUNISM AND MR. CHURCH

"NOTHING ILLUSTRATES better the dangerous left-wing ideas of Attorney General Wade Church than his proposals for the setting up of a 'people's council' in Arizona.

"According to Church our legislature is 'dominated' by special interest groups operating from the Adams Hotel in Phoenix. For this reason the legislature does not reflect the will of the majority of the people, the attorney general argues. To 'correct' this situation Mr. Church proposes the selection of a 'people's council' which presumably, should tell the legislature what to do and how to do it. Mr. Church thinks that this 'people's council' should be organized and run by Arizona's labor unions.

"MR. CHURCH'S 'people's council' idea comes straight from the writings of Karl Marx, the god of 'scientific socialism' and the prophet of the international Communist

movement. The same idea was the cornerstone of the philosophy of Lenin, the founder of the Soviet state. The same idea is the political basis of all Communist regimes all over the world. The story of communism in power is essentially a story of the 'people's council' idea of government put into practice.

"When the Russian Czarist government fell apart early in 1917, the Russian democratic parties, which enjoyed the overwhelming support of the Russian people, formed democratically elected government organizations, including a central (federal) government responsible to an assembly (parliament).

"Later on the Russians elected a constituent assembly.

"In all these elected bodies the Communists had but a tiny and insignificant minority.

"But the Communists were not interested in votes—they never are. They were, as they are, interested in power alone.

"THE COMMUNIST PARTY, under Lenin, created its own 'people's councils' which functioned independently of the government just the way Wade Church wants the Arizona 'people's council' to function.

"These *Russian 'people's councils'* were supposed to consist of 'soldiers and sailors' and 'workers and peasants,' but were, in fact, dominated and manipulated by the Communists.

"It was these councils that played the most decisive role in the overthrow of the Russian national all-party government headed by the social democratic leader, Kerensky.

"It was these 'people's councils' that completed the destruction of the Russian 'bourgeois' (capitalist) state and

imposed the Communist regime. The first Communist cabinet, headed by Lenin, was actually called a people's council of commissars. In Russian the word 'soviet' means 'council' and the Soviet government is quite properly called 'council government.'

"THE COMMUNISTS employed the same 'council' technique in East Europe, as well as in the Far East, including Red China. *People's councils*, at times called patriotic councils, national councils, anti-Facsist councils, democratic councils, peace councils, and so on, *were formed by the Communists everywhere with the sole purpose of 'guiding,' i. e. intimidating, blackmailing, and terrorizing* the elected parliaments and district assemblies, which were not, at the beginning, Communist controlled.

"The 'people's council' idea is only another name for the Communist technique of the seizure of power and for the Communist way of enabling a small minority to control and eventually to rule the huge majority.

"According to Communist theoreticians, from Marx and Lenin to Krushchev and Mao, only the 'advance guard' (the Communist leaders) of the 'working class' (the majority of the people) know how to interpret the 'historical laws of development' of our society.

"This supposedly enables the Communist leaders to know best what's good for the rest of us.

"Communists believe that they have the right and the duty to 'guide' the masses of humanity along the 'correct road' leading to socialism. The Communist-controlled 'people's councils' do this 'guidance' work with regard to the state.

" *'THE PEOPLE'S COUNCIL' idea of Attorney General Church* is therefore nothing but a disguised Marxist idea of

minority rule over the majority.

"We are certain that most Arizonans will resolutely reject Mr. Church's alarming conceptions of government.

"We also sincerely hope that the Arizona labor movement—at whose annual convention last week Mr. Church first voiced his 'people's council' proposals—will have the good sense to disassociate itself completely from such dangerous ideology, which can only do harm to the rank and file working man.

"BUT MR. CHURCH, himself, owes an urgent explanation to the public. He has to state, publicly and clearly, whether or not his 'people's council' proposals are part and parcel of a general Marxist philosophy of government and of life.

"Does Mr. Church advocate socialism for Arizona?

"Does he advocate communism?

"Does he want 'people's councils' to take over our state government in the way thay have taken over the governments of all the unhappy lands behind the Communist Iron Curtain?" (Emphasis ours.)

Plaintiff Church immediately filed his complaint for libel against Phoenix Newspapers, Inc., the publisher, Eugene Pulliam, and the editorial writer, Michael Padev, in the Superior Court for Maricopa County. On May 12, defendants published plaintiff's reply to the editorial rejecting the newspaper's "opinions and inferences expressed" regarding his talk. Defendants Pulliam and Phoenix Newspapers, Inc., after unsuccessful motions to dismiss the complaint, filed their answer thereto on May 29, 1961. Plaintiff thereafter was granted leave to amend his complaint, and it is upon the

amended complaint, and the subsequent answers of all defendants, that issues were joined. The case came on for trial April 29, 1963, and after a lengthy trial the jury entered a verdict for plaintiff in the sum of $30,000 compensatory damages, and $20,000 punitive damages. From this verdict and judgment, and from orders denying defendants' motion to set aside the verdict and judgment, and motions for a new trial, defendants appeal. We shall hereafter refer to the parties as they were designated below, as plaintiff and defendants.

Although defendants make numerous assignments of error on this appeal, three principal issues emerge: (1) Whether the court before trial ruled correctly that the editorial was libelous per se; (2) Whether the editorial was qualifiedly privileged, and if so, whether the editorial constituted fair comment; (3) Whether sufficient evidence was adduced to prove both falsity and actual malice. In the light of New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L. Ed.2d 686 (1964) we must also determine whether the verdict and judgment abridge unconstitutionally the freedoms guaranteed by the First Amendment to the United States Constitution.

1.

The first question to be decided is whether the trial court was correct in its ruling before the trial that the editorial was libelous per se. We agree that it was. Defendants vigorously contend that, at most, the editorial is susceptible to two meanings—one libelous, the other nonlibelous; that if anything, the editorial is libelous per quod and as such should have been submitted to the jury for a determination whether the editorial was actionably defamatory. Defendants assert

that the editorial was a comment upon a political speech, that such comment was based upon true facts, and that while the editorial does state that the proposed "people's council" is a communist device, nevertheless, the idea, and not the plaintiff, was the subject of the attack, *ergo*, there is no charge that plaintiff has communist sympathies.

The guideline to be followed in determining whether a publication is libelous in and of itself has been previously stated by this Court in Central Arizona Light & Power Co. v. Akers, 45 Ariz. 526, 46 P.2d 126 (1935). In that case it was held:

> In determining whether the [publication] is libelous *per se*, we look to the language alone. * * * Words that are libelous *per se* do not need an innuendo because they are libelous in and of themselves. 45 Ariz. at 536, 46 P.2d at 131 (1935).

And, in Phoenix Newspapers v. Choisser, 82 Ariz. 271, 312 P.2d 150 (1957), it was stated that "* * * the entire article must be considered as a whole. * * * This is true not only with reference to its exact language but in accordance with its sense and meaning under all the circumstances surrounding its publication."

A publication is libelous "if [it] tends to bring any person into disrepute, contempt or ridicule or—to impeach his honest, integrity, virtue or reputation, and is false and defamatory." Phoenix Newspapers v. Choisser, 82 Ariz. 271, 275, 312 P.2d 150, 153 (1957). And see Broking v. Phoenix Newspapers, 76 Ariz. 334, 337, 264 P.2d 413, 415, 39 A.L.R.2d 1382 (1953).

The trial court in the first instance examines the publication for its defamatory content, and "if the language charged to be libelous is unambiguous it is the function of the court

to say whether it is libelous per se". Broking v. Phoenix Newspapers, supra, 76 Ariz. at 337, 264 P.2d at 415.

Viewing the editorial as a whole, and keeping in mind that

> "What counts is not the painstaking parsing of a scholar in his study, but how the newspaper article is viewed through the eyes of a reader of average interest." Afro-American Publishing Co. v. Jaffe, 125 U.S.App.D.C. 70, 366 F.2d 649, 655 (1966),

and that

> "[T]he publication is to be measured, not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader." MacLeod v. Tribune Publishing Co., 52 Cal.2d 536, 547, 343 P.2d 36, 41 (1959),

we are convinced that the editorial is libelous on its face, i.e., *per se*, and that the trial court was correct in its ruling. [1] Taking the editorial statement for what it actually is, it could not have any other effect than to cause injury to the

1. Defendants devote considerable space in their brief to the proposition that the plaintiff, for his failure to allege "special damages" has drawn a complaint which is insufficient as a matter of law and good pleading. The controversy still rages among commentators and courts as to the relative significance of the legal principles distinguishing libel per se from libel per quod [Compare Eldredge, "The Spurious Rule of Libel Per Quod", 79 Harv.L.Rev. 733 (1965/66), with Prosser, "More Libel Per Quod", 79 Harv.L.Rev. 1629 (1965/66); and see Hinkle v. Alexander, 244 Or. 267, 411 P.2d 829, 417 P.2d 586 (1966): "We are not so much concerned about which of the opposing rules has the actual support of a majority of the courts. Our prime concern is which rule is the better, more workable and less confusing. We conclude that the Restatement rule (§ 569 (1938)) is to be preferred and adhere to it". 244 Or. at 277, 417 P.2d at 589]. In this case, however, the defamatory meaning is within the editorial itself. See Cen. Ariz. L. & P. Co. v. Akers, 45 Ariz. 526, 46 P.2d 126 (1935).

reputation of a person in Wade Church's position,[2] for it charges that "Mr. Church's 'people's council' idea" is the political basis of all communist regimes and the "cornerstone of the philosophy of Lenin, the founder of the Soviet state," as well as coming "straight from the writings of Karl Marx, the god of 'scientific socialism' and the prophet of the international Communist movement". It then proceeds to explain in scholarly, clear and unmistakable language how communists employed the people's council technique (already described as "Mr. Church's 'people's council idea' ") for the purpose of " 'guiding' i.e., intimidating, blackmailing, and terrorizing the elected parliaments and district assemblies" in the process of seizure of power by communists. It plainly states "*The people's council idea of Attorney General Church* is therefore nothing but a disguised Marxist idea of minority rule over the majority". (Emphasis added.)

The apparently rhetorical questions at the end of the editorial ask plaintiff to state whether "*his* 'people's council' " proposal (already characterized as a communist device employing the technique of intimidation, blackmail and terrorism) is part and parcel of a *general* Marxist (i.e. communist) philosophy of government and life, and whether he advocates socialism or communism for Arizona, with a desire to have people's councils (characterized as "Mr. Church's" idea) take over the state government in the way they have taken over all unhappy lands behind the Communist Iron Curtain. The insinuation that "Mr. Church's idea," embodies and approves of communist methods of intimidation, blackmail and terror, is so apparent here as to leave no room for

2. Cepeda v. Cowlew Magazines & Broadcasting Co., 328 F.2d 869 (9th Cir. 1964) aff'd., 392 F.2d 417 (9th Cir. 1968); Fairbanks Publ. Co. v. Pitka, 376 P.2d 190 (Alaska 1962).

argument. "A person may be liable for what he insinuates as well as for what he says explicitly." Cameron v. Wernick, 251 A.C.A. 1025, 60 Cal.Rptr. 102, 104 (1967); MacLeod v. Tribune Publishing Co., supra, 52 Cal.2d at 547, 343 P.2d at 42 (1959). There is respectable, and persuasive authority for the proposition that to charge a person with communist sympathies, leanings, and sentiments, or that such person is a "fellow-traveler", constitutes libel *per se*:

> "Whatever the rule may have been when anti-communist sentiment was less crystalized than it is [Citations] it is now settled that a charge of membership in the Communist Party or communist affiliation or sympathy is libelous on its face." MacLeod v. Tribune Publishing Co., 52 Cal.2d at 546, 343 P.2d at 41. And see, 33 A.L.R.2d 1186, 1212 (1954) and cases collected therein.

The whole thrust of the editorial is to link inseparably Wade Church and the idea of a "people's council" to the communist "people's council", thus charging him with espousing a communist doctrine involving intimidation, blackmail and terrorism. This is clearly no less than a charge of being in sympathy with communism in its lawless and violent aspects. The defamatory impression originally left in the minds of the readers of this editorial was thus reinforced by the series of questions at the conclusion of the editorial.

There is probably no quicker, more devastating means for bringing a man into public contempt and hate than to affix to him the label "communist", or to link him otherwise to sympathy with communist ideology in its violent aspects, and this was particularly so in 1959. It is absurd to assert that under such circumstances the editorial, as claimed by the defendants, merely attacked plaintiff's idea, and therefore was completely lacking in any accusation against plaintiff himself. It was basically a statement that plaintiff's attitude, expressed by

his idea, was sympathetic with violent communist methods.

As was said in Afro-American Publishing Co. v. Jaffe, 125 U.S.App.D.C. 70, 366 F.2d 649 (1966):

> "Appellant contends that as a matter of law the article is not libelous since Mr. Stone did not flatly state that plaintiff was prejudiced, and because it is not a statement of fact about plaintiff's conduct but a statement of opinion about his attitude. *Where readers would understand a defamatory meaning liability cannot be avoided merely because the publication is cast in the form of an opinion, belief, insinuation or even question.* A statement about one's attitude is defamatory if it tends to lower him in the esteem of the community." 366 F.2d at 655 (1966) (Emphasis added.)

Defendants state that in 1959, it was not *unlawful* in Arizona to be a communist or a member of the Communist Party.[3] Though this is true from a purely legal point of view, our discussion hereafter of the issue of malice forecloses the relevance of this argument.

What we have so far stated does not, of course, foreclose the possibility that the judgment cannot stand in light of recent United States Supreme Court decisions dealing with the freedoms guaranteed by the First Amendment. Our inquiry will be directed, therefore, to an examination of the facts and proceedings of the case at bar "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited,

3. However, in 1961, the state legislature proscribed the Communist Party with regard to any rights or recognition as a political party in Arizona, by reason of its "dedication to the proposition that the present constitutional government of the United States, the governments of the several states, and the government of the state of Arizona and its political subdivisions ultimately must be brought to ruin by any available means, including resort to force and violence." A.R.S. § 16-205. Arizona Communist Control Act. (1961).

robust, and wide-open, and that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials". New York Times v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed. 2d 686 (1964).

The First Amendment to the Constitution of the United States provides in part that "Congress shall make no law * * * abridging the freedom of speech, or * * the press; * * *". The decision in Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925) made the freedoms guaranteed by the First Amendment applicable to the states via the Due Process Clause of the Fourteenth Amendment. And since *Gitlow*, the permissible scope of state action in regulating these freedoms through legislation or otherwise has been greatly circumscribed by many decisions of the United States Supreme Court. Of controlling importance for the proper disposition of this appeal is the rule announced by the Court in the case of New York Times Co. v. Sullivan, supra. The Court held:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with *'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.*" 376 U.S. at 279-280, 84 S.Ct. at 726 (1964) (Emphasis added).

Following the announcement of the *Times* decision, commentators expressed divergent views as to which of the constitutional tests[4] the Court relied upon in reaching the Times

4. "Clear and present danger", (Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919)); "redeeming social value", (Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); or "balancing" (see Konigsberg v. State Bar, 366 U.S. 36, 81 S.Ct. 997, L.Ed.2d 105 (1961)).

result.[5] This matter in part was put to rest by the remarks of Justice William Brennan, Jr. in a paper delivered as the Alexander Meikeljohn Lecture at Brown University on April 14, 1965. The lecture, entitled "The Supreme Court and the Meikeljohn Interpretation of the First Amendment", 79 Harv.L.Rev. 1 (1965), in part stated:

> "[T]he Court examined history to discern the central meaning of the first amendment, and concluded that the meaning was revealed in Madison's statement 'that the censorial power is in the people over the Government and not in the Government over the people' ". 79 Harv.L.Rev. 1, 15 (1965).

For Alexander Meikeljohn, the First Amendment and its "central meaning" absolutely forbade any encroachment upon its freedoms from any quarter. Meikeljohn, The First Amendment Is An Absolute, 1961 Supreme Court Review 245. And, Justice Black, in a concurring opinion in the *Times* decision in which Justice Douglas joined, expressed a similar view:

> "I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely 'delimit' a State's power to award damages to 'public officials against critics of their official conduct' but completely prohibit a State from exercising such a power." 376 U.S. 254, 293, 84 S.Ct. 170, 733 (1964). And see Black, The Bill of Rights and the Federal Government in THE GREAT RIGHTS (Cahn ed. 1963).

The majority of the Court as yet do not subscribe to the absolutist philosophy, for as was stated by Justice Brennan further on in the Meikeljohn Lecture:

> "Note that the *New York Times* principle has an

5. See, e.g. Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment", 1964 Supreme Court Review 191 (Kurland ed.).

> important qualification: it does not bar civil or criminal libel actions for false criticism of the official conduct of a public official if that criticism is made with knowledge of its falsity or in reckless disregard of whether it was false or not. *The underpinning of that qualification is the 'redeeming social value' test.*" 79 Harv.L.Rev. 1, 18-19 (1965) (Emphasis added.)

The 'redeeming social value' test (in the context of Times) implies that though a communication or publication may have been privileged when made or published, its privileged status is defeasible upon a showing that the publisher was motivated by actual malice—knowledge of falsity, or reckless disregard for whether that which spoken or published was false. Therefore, in order for a publication or utterance to retain its privileged status, it must, in the marketplace of ideas and opinions, be of redeeming social value.

This view is buttressed by the later opinion of the Court in the case of Garrison v. Louisiana, 379 U.S. 64, at page 75, 85 S. Ct. 209, at page 216, 13 L.Ed.2d 125 (1964) where it is stated:

> "The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. [Citations] That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of

utterances which *'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.* * * *' Chaplinsky v. New Hampshire, 315 U.S. 568, 572 [62 S.Ct. 766, 86 L.Ed. 1031]. *Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.*" (Emphasis added.)

As a further elaboration upon the constitutional rule announced in Times, vis-a-vis "malice", the Court in Associated Press v. Walker, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) noted:

> "Its [New York Times] definition of 'actual malice' is not so restrictive that recovery is limited to situations where there is 'knowing falsehood' on the part of the publisher of false and defamatory matter. *'Reckless disregard' for the truth or falsity, measured by the conduct of the publisher*, will also expose him to liability for publishing false material which is injurious to reputation." 388 U.S. at 164, 87 S.Ct. at 1996. (Emphasis added.)

And, in summary, the Court has held in Linn v. United Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966):

> "[T]he most repulsive speech enjoys immunity provided it falls short of a *deliberate or reckless untruth.* But it must be emphasized that malicious libel enjoys no constitutional protection in any context." 383 U.S. 53, 63, 86 S.Ct. 657, 663 (1966). (Emphasis added.)

It is incumbent upon this Court to examine our cases dealing with libel of public officials to determine whether the standards announced therein square with the constitutional principles which bind this Court in the disposition of this appeal.

2.

The trial court, in addition to its ruling on the question of libel per se, found that the publication was a qualifiedly privileged communication, the occasion for its privileged status being plaintiff's public speech given at a time when plaintiff was Attorney General of this State. The rule of *Times* is a constitutional rule of privilege, and we are bound to meet its requirements. Our prior decisions regarding what circumstances constitute an occasion for such privilege require that publications about matters of public interest and concern are to be accorded wide latitude, and that only proof of *actual malice* and falsity will defeat the privilege and allow an award for damages. See Phoenix Newspapers v. Choisser, supra, 82 Ariz. at 277, 312 P.2d at 154; Broking v. Phoenix Newspapers, 76 Ariz. at 340, 264 P.2d at 416.

The question arises whether the Arizona standard of "actual malice" meets foursquare the *Times* standard. We previously have held that "Malice cannot be inferred from an article published on a privileged occasion alone. * * * The malice which plaintiffs must establish is not legal malice or malice at law, but it must be actual malice, malice in fact, express malice". Phoenix Newspapers v. Choisser, 82 Ariz. at 278, 312 P.2d at 155.[6] The constitutional requirement forbids any presumption of malice, or inference of malice and makes it the burden of plaintiff to prove actual malice. New York Times v. Sullivan, 376 U.S. 254, 284, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). We believe that our cases dealing with the question of malice and its substance clearly meet the rigid requirements of the *Times* rule, and particularly

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6. This rule of malice was cited approvingly in New York Times v. Sullivan, 376 U.S. at 280, footnote 20, 84 S.Ct. 710.

the later decision in Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) which held:

> "[O]nly those false statements made with the high degree of awareness of probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." 379 U.S. at 74, 85 S.Ct. at 216 (1964).

3.

The crucial, and dispositive determination to be made on this appeal is whether plaintiff at trial introduced evidence sufficient to submit to the jury the question of malice and falsity as defined by *Times* and the cases following thereafter. Moreover, that evidence must be of "convincing clarity" to satisfy the constitutional standard. *Times*, supra, 376 U.S. at 285-286, 84 S.Ct. 710. To prove actual malice[7] is indeed a heavy burden to be borne by the plaintiff here, and that is as it should be. Otherwise, the use of a libel suit as a means for stifling free debate and discussion of important matters of our times would be greatly increased, with the result that

> "The threat of being put to the defense of a lawsuit brought by a * * * public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, * *" Washington Post Co. v. Keogh, 125 U.S.App.D.C. 32, 365 F.2d 965, 968 (1966).

We are therefore in accord with the principle of privileged

7. It is of interest to note the view expressed by Justice Black regarding the "malice" requirement of *Times*:

> " 'Malice' * * * is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguards embodied in the First Amendment." (Black, concurring in *Times*, 376 U.S. at 293, 84 S.Ct. at 733.).

communication regarding a public official, even where the defamatory publication is false, but must also apply the proviso that it was not made "with knowledge of its falsity or in reckless disregard of whether it was false or not". New York Times v. Sullivan, supra. Since the jury by its verdict must have found that the editorial was made either with knowledge that it was false, or with reckless disregard of whether it was false, we examine the record to determine whether there was sufficient evidence to sustain such finding.

The evidence presented at the trial clearly disclosed that plaintiff was neither a communist nor sympathetic with communist theology or ideology. The overwhelming weight of the evidence adduced from both defendants' and plaintiff's witnesses demonstrated that to label plaintiff as a communist or impute to him ideologies which inclined to communism would be to utter a gross untruth.

The evidence introduced with regard to the inspiration for, the preparation, and the approval of the editorial is illuminating on the question of malice. Plaintiff proceeded on the theory that the editorial demonstrated unequivocally a reckless disregard for fair and factual commentary respecting the speech delivered to the convention in Flagstaff on May 7. Defendant Padev, author of the editorial, testified that he did not hear the speech, and that he was not present in Flagstaff on May 7. He testified:

> "Q. Let me ask you this question, and I want it clearly understood between you and me what the import of it is, as pertaining to your obtaining information, the information that you obtained before you wrote this editorial, and for the purpose of writing this editorial was based upon the report, printed report, of your reporter in your newspaper and what you heard

over the radio, am I right?

"A. You are right.

"Q. From no other source?

"A. Two newspapers, not one.

"Q. From no other source?

"A. Yes, sir."

He testified that the phrase "people's council" was the basis for his editorial comment; that the idea of a people's council was a "very dangerous idea indeed". Quite obviously, the meaning Padev attributed to the phrase "people's council" was not the meaning intended by Church, and a cursory examination would have revealed the discrepancy.

Mr. Padev testified that he had not heard the speech. His further testimony appears as follows:

"Q. Prior to the time you wrote this editorial, did you suspect this man of being possessed with communistic inclinations?

"A. No, sir.

"Q. Have you since?

"A. No.

"Q. You don't today?

"A. No, I don't. I certainly don't, no.

"Q. You made no investigation to obtain the factual matters as printed in that editorial, except from what you heard?

"A. What investigation? I knew what I knew, which was, I think, enough about the council, the *communist council device*. And it was a fact that Mr. Church had made a speech and recommended a device which could have been, or could be, usually it is, used by the communists, and I attacked the idea." (Emphasis added).

Throughout his testimony defendant Padev insisted that it was not plaintiff Church he was attacking but "Mr. Church's

idea of the people's council". He further testified that "there is nothing communistic about Mr. Church's ideas either" and that there was nothing communistic about Mr. Church's speech.

It is a matter of general knowledge, particularly among persons familiar with communist vocabulary, that many words and phrases in common usage by non-communists when used by communists, have a completely different connotation and meaning. See J. Edgar Hoover, Masters of Deceit (reference to communist use of "Aesopian language") 1957. Also, Harry and Bonaro Overstreet, the War Called Peace (chapter 9, "Speaking in Tongues") 1961. Defendant Padev testified to considerable first hand knowledge of communist procedures and therefore was without doubt aware of these semantic differences. The newspaper reports, as well as plaintiff's actual speech clearly demonstrated the ordinary meaning of the phrase "people's council," particularly in view of Padev's testimony above.

An editor of the Republic, Frederick Marquardt, testified that it was his duty to approve all editorials before publication. He stated, however, that in this particular instance he did not approve the editorial before publication, did not read it before publication, but did know the general contents of the editorial and knew what the title was to be. To the question why he had not approved it, he replied that defendant Pulliam, the publisher, had approved the editorial. The evidence developed that defendant Pulliam was out of Phoenix on the day of approval; that Pulliam had telephoned the offices of the *Republic*, for general purposes, and had talked with Padev about the proposed editorial. Pulliam did not have a copy of the proposed editorial nor is the evidence entirely clear that he knew precisely how it was phrased.

Defendant Pulliam testified that he had read the newspaper report of the Church speech in his own paper. He further stated that defendant Padev had telephoned him and called his attention to the phrase "people's council" which disturbed him (Pulliam) and that "there is probably nobody in America who understands communism like he (Padev) does".

Defendants Pulliam and Padev and the witness Marquardt all testified that they had no belief that plaintiff Church was a communist, and the witness Marquardt stated that he had no knowledge or belief that Church had any sympathy for the communistic philosophy.

Michael Padev was qualified as an expert on communism at trial. Much of his testimony was directed to how the "people's council" device was a convenient means for communists to take over non-communists governments. In the face of the evidence regarding plaintiff's actual speech, and the newspaper reports thereof which referred to "a people's council" in the clearly expressed meaning of a lobby group to offset the "excessive influence" being exerted on the legislature by other such groups, or "councils," Padev steadfastly asserted that the council proposed by Church could surely be the first step to communism in Arizona government. Padev was asked:

> "Q. You know that communism thrives on animosity and destruction of the enemy, and you knew, didn't you, that the editorial would destroy this man, didn't you?"

He replied:

> "A. I wasn't thinking of Mr. Church, I was thinking of Mr. Church's proposal, people's council.
>
> "Q. If you weren't thinking of Mr. Church, why did you say very first up there 'Communism and Mr. Church'?
>
> "A. That was taking the two facts together, communism, and the Church speech at Flagstaff on the other hand, and the editorial tried to discover what was the relationship between the two."

The defense proceeded on the theory that every statement of the editorial was true or substantially true. Padev again testified at length upon communist theory, the revolution in Russia, the great and abiding fear he had in a communist takeover in America, and the strong possibility that the people's council proposed by plaintiff would be the vehicle for communist domination of Arizona.

Padev revealed his true belief and state of mind in the following testimony:

> "A. Well, the latest one which really made me write the editorial was the proposal, the people's council proposal, he set forth in his Flagstaff speech.
>
> "Q. Why did you consider that left-wing?
>
> "A. It is very left-wing, because, first he says this is a shabby world unless we correct it. This is awful, you know. *This is one of the most effective methods of left-wingers and of communis.. of attacking the free enterprise system.* You create the impression that everything is awful. He said shabby world, 'our children will live in a shabby world,' and things like that. It is very bad.
>
> "Second, he says the legislature is controlled by the Adams Hotel. *Now, in Russia they used to say that the legislature was controlled by the—they used to call it the Astoria Hotel. That is where the bankers were going. In Marx, you will see he says the same thing, that it is controlled by the stock exchange. These are standard expressions, routine expressions, by people belonging to the left-wing who want to undermine the confidence which people have in their own legislature.* Now, if you say the legislature is run by the Adams Hotel—

how many people can you put in the Adams Hotel—you don't believe in voting any more. It means that the legislature elected by the people is controlled by about ten people in the Adams Hotel. This is a very, very dangerous idea.

"Q. This is why you considered it dangerous?

"A. Yes, sir. Yes, sir, left-wing and dangerous." (Emphasis supplied.)[8]

8. Plaintiff introduced into evidence the column of Claiborne Nuckolls published in the *Arizona Republic* on March 29, 1959. This piece of political commentary, set out below, expresses a position not unlike that advanced by plaintiff in his speech on May 7, 1959.

"THE STATE WE'RE IN

By Claiborne Nuckolls

"IF ANYONE doubts there exists a 'third house' of the Arizona Legislature that amounts almost to an invisible government, such doubts would have been dissipated had they been able to watch the recent legislative session from the sidelines as this reporter did.

"It is a house composed of lobbyists and other representatives of special interests, for the most part selfish in their goals. Its influence on what the lawmakers did or did not do was perhaps stronger, more dominating than this observer has ever seen before, particularly in the state senate.

"What and who are the interests that comprises the 'third house'? First come the copper mines. And don't believe for a moment that the political power of the mining interests has waned.

"Unrelenting opposition of this group almost succeeded in blocking any kind of school finance legislation and did in fact, result in passage of a measure that falls far short of the type of bill that Governor Fannin wanted. That any kind of bill at all was passed I attribute to two things primarily: (1) the governor's refusal to be cowed by the mining spokesmen, and (2) the backing given him in the less copper-collared house of representatives.

"RANKING NEXT in importance as members of the 'third house' come the railroads, the utilities and the pipeline corporations. However, it is to the credit of the railroads and utilities that, so this column is informed by responsible sources, they

Clearly, this testimony could have been considered by the jury to be persuasive in determining whether the editorial was actuated by actual malice.

To the extent that Padev was qualified to testify as to communist theory, institutions, and devices, the factual basis of the statements of the editorial regarding those subjects may be accepted. Yet this could not necessarily overcome the knowledge of falsity of the statements of fact as applied to what the plaintiff proposed in his speech, as shown by the reportorial accounts immediately following it, and which both defendants Padev and Pulliam testified they had read before the editorial was published.

finally saw the need for and went along with school aid legislation. –

"Railroad lobbyists, however, did push through a law requiring the public to bear half the costs of installing safety signal devices at grade crossings, and the utilities nearly got through a bill requiring the state to pay costs of relocating utility facilities on highway rights of way when space occupied by these installations is needed for highway purposes.

"Some representatives of the insurance industry almost prevented passage of a bill permitting state highway patrolmen to retire at a younger age than now is allowed.

"This column is informed that the liquor industry was quite active in lobbying against certain phases of proposed stronger traffic control legislation, particularly as regards stiffer penalties and more certain and sure punishment for drunk driving.

• • •

"However, the influence of lobbyists was apparent in connection with virtually every major piece of legislation passed by the last legislative session.

"I am reminded of what Johnny Johnson, former representative from Parker, once said as he ran the gantlet of lobbyists after emerging from the house chamber:

" 'There's nothing wrong with the legislature except there's too many lobsters around here. Every time I come out of that door a dozen lobsters grab me and try to lobster me.' "

Defendants complain of the trial court's refusal to given an instruction on the defense of fair comment. We agree this should have been done. "Fair comment" is a form of qualified privilege applied to publications of the news media. It is limited to discussions of matters which are of legitimate concern to the community as a whole because they materially affect the interests of all the community. See Prosser, Law of Torts, 3rd ed., § 110 (1964), and cases cited. Under the ruling in *Times*, it extends not only to expressions of opinion, but likewise to false statements of fact, unless made with "actual malice" as defined in *Times*. If the jury finds such actual malice, the defense of fair comment is defeated:

> "Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. *Both defenses are of course defeasible if the public official proves actual malice, as was not done here.*" *Times* 376 U.S. at 292, 84 S.Ct. at 732.

The questions at the conclusion of the article proved to have the most significant impact upon plaintiff and doubtless had the same effect upon the reading public. During testimony of defendant Pulliam, the following occurred:

> "Q. And you knew what the consequences of publication of that article would mean, didn't you? Didn't you know what consequences of that publication would mean?
>
> "A. I don't know whether I knew what the consequences of any publication will be. I couldn't possibly expect to know what the consequences are.
>
> "Q. You knew that you would get letters such as Mrs. Stanlis's letter, did you not Mr. Pulliam?
>
> "A. I didn't know whether we would get a single letter or not. How could I know?

> "Q. Well, do you know what impact this made upon your reading public?
>
> "A. No, I don't.
>
> "Q. Well, let me read you what impact it made, printed by your own paper.
>
> " 'Good Work' Exhibit No. 6
>
> "EDITOR, THE ARIZONA REPUBLIC:
>
> "I want to congratulate you on the fine job you are doing in exposing communists in government.
>
> "I had heard Mr. Church on TV in the last campaign and must admit I was completely fooled. In fact, I actually went out and worked for the man.
>
> "Prior to reading your editorial I had never heard of these 'people's councils'. I suggest you take the initiative in starting a recall at once.
>
> "Keep up the good work."
>
> • • •
>
> Q. And do you think any other people thought like she did?
>
> "A. I don't know.
>
> "You don't. Well, let me show you Exhibit No. 7 and ask you if that is not an expression of what impact this editorial made upon your reading public?
>
> "A. Well, this is certainly a very fine defense of Mr. Church, and we printed it.
>
> • • •
>
> "Q. Let me show you Exhibit 8 for identification and ask you if that is another reader impact that you printed in your newspaper?
>
> "A. Well, this letter says a lot of worse things about us than we ever said about Church."

Exhibits 7 and 8 are set out below.[9]

---

9. ***Plaintiffs' Exhibit No. 7:***

"Ruined Breakfast

"Editor, The Arizona Republic:

I am a Republic subscriber, I also read The Republic.

This and other similar testimony appearing on the record, was relevant for the purpose of showing damages, and the jury could have concluded that plaintiff was entitled to punitive damages as a result of the publication.

The final point which must be discussed is the matter of the court's instructions to the jury on the substantive law applicable to the case.

After instructing the jury that the court had found the

"I like The Republic. I realize that it is an opinionated paper.

"I do not know Wade Church. The majority of the voters in this state do know something about him, however.

"The editorial attack on Wade Church on May 11 must have ruined thousands of breakfasts. I mean good Republican breakfasts. I, for one do not care to have my intelligence insulted before nine in the morning. God save the intelligence of poor Mr. Church.

"This front page fiasco smacks of your most junior editorial writer, reflecting a sorry animosity of his employer, turning out a scorcher, paying no attention to truth, logic, relevance, or good taste.

"Gentlemen, the day is past when the best way to smear a man is to scream, 'Communist!'

"The editorial was far out of character for The Republic, I remain a subscriber and a reader. Not a Communist."

Plaintiffs' Exhibit No. 8:

"Church Defended

"Editor, The Arizona Republic:

"So you are up to your old trick of destroying those who get in your way or expose your racket. Racket it is, and just as bad as any labor rackets that have been getting publicity.

"Big Business racketeering is not publicized, but is equally guilty. Wade Church is a fine man with a fine family. He would fight racketeering wherever he found it. Because he is courageous enough to expose the truth of the way our legislature works, he has laid himself wide open to your wrath.

"You do not like opposition. Your philosophy is 'rule or ruin.' Perhaps you have gone a bit too far this time. Let us hope so, for the good of the people of Arizona."

editorial to be libelous per se and qualifiedly privileged, the jury was instructed that in order for plaintiff to prevail, it must find the editorial was false and was actuated by actual malice. On the matter of falsity, the court properly instructed that:

> "* * * [I]t is not necessary that the editorial be literally true in every detail. If the editorial is substantially true so as to justify its gist and the reasonable inferences therefrom, or if the plaintiff does not establish by a preponderance of the evidence that the article and reasonable inferences therefrom is not substantially true, then your verdict must be for the defendants."

The instruction regarding malice, to which defendants object, is as follows:

> "Actual malice may be inferred from the wrongful motive in the publication of the matter, if such be shown, or may be inferred from the absence of proper caution or want of proper justification for the publication of the matter, if such be shown, lack of good faith, if such be shown, or wanton or reckless disregard of the truth in publicizing the matter in the publication, if such be shown."

It seems obvious, from an examination of the proposed instructions on malice submitted by both plaintiff and defendant, that the trial court considered carefully the established legal basis for each instruction. However, New York Times v. Sullivan, supra, was not decided until nearly a year after trial of this matter. Consequently, failure to apply the principles enunciated therein at the trial of this case is not an adverse reflection on the trial court. Nevertheless, it is clear that the United States Supreme Court has made application of the *New York Times* case retroactive at least insofar as any cases pending in an appellate court from and after its issuance in March of 1964.

The definition of "actual" malice has been set forth, supra. And, in Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966) the United States Supreme Court said:

> "It is clear that the jury instructions were improper. * * * The trial court * * * defined malice to include 'ill will, evil motive, intention to injure. * * *' This definition of malice is constitutionally insufficient where discussion of public affairs is concerned; * * *. * * * [W]e held in New York Times that a public official might be allowed the civil remedy only if he establishes that the utterance was *false and it was made with knowledge of its falsity or in reckless disregard of whether it was false or true.*" 383 U.S. at 83-84, 86 S.Ct. at 675.

Both plaintiff and defendants requested an instruction which included the elements of "spite or ill will", which were specifically rejected in *Rosenblatt*. Even if defendants might have been entitled, after the trial, but subsequent to the *Times* decision, to attack the trial court's instruction including "spite or ill will" as evidence of actual malice, defendants in their reply brief in this appeal specifically cite *Times*, supra, yet not only do they fail to attack the instruction on this basis, but merely attempt to refute testimony "evidencing ill will".

Nevertheless, we are of the opinion that, measured by the rules in New York Times v. Sullivan, supra, Rosenblatt v. Baer, supra, and Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), the trial court's instruction on "actual malice" was fatally defective in its direction that in the alternative it may be inferred by "wrongful motive in the publication of the matter * * * or may be inferred from the absence of proper caution, or want of proper justification * * * lack of good faith * * *." *New York Times* rules out "negligence in failing to discover misstatements" as constitutionally insufficient for a finding of actual

malice. In St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), the Court held that lack of reasonable care in determining whether an asserted libel was false did not conform to the *New York Times* constitutional test of actual malice, nor could such lack be considered "reckless disregard" of whether the utterance was false or true. The instruction here that malice may be inferred from "absence of proper caution" is so close, if not synonymous with the phrase "lack of reasonable care", that it cannot meet the constitutional test flatly enunciated in *New York Times* above.

We therefore hold that: the court did not err in ruling the editorial was libelous per se, and in so instructing the jury, but that the instruction defining actual malice did not meet the required federal rule, and therefore requires that the case be reversed for a new trial.

Reversed and remanded with directions for further proceedings in accordance herewith.

McFARLAND, C. J., concurring.

STRUCKMEYER, Justice (specially concurring).

Since there are divergent opinions by the members of this Court as to the proper disposition of this case, I feel that it is desirable to briefly express the basis for my concurrence with Justice Lockwood.

The hard core of the editorial lies in these few sentences:

> "Nothing illustrates better the dangerous left-wing ideas of Attorney General Wade Church than his proposals for the setting up of a 'people's council' in Arizona. * * * THE COMMUNIST PARTY under Lenin created its own 'people's councils' which functioned * * * just the way Wade Church wants the Arizona 'people's council' to function * * * People's councils * * * were formed

> with the sole purpose * * * of intimidating, blackmailing, and terrorizing the elected parliaments and district assemblies * * * The 'people's council' idea is only another name for the Communist technique of the seizure of power * * *."

These statements charge, not as an expression of opinion but as a positive assertion of fact, that Church proposed creating a people's council in Arizona to function just the way the councils that the Communist Party set up under Lenin functioned, they being formed for the purpose of intimidating, blackmailing and terrorizing legislatures and that this is the means of the Communists' seizure of power. It can only be understood to mean that Church was advocating the seizure of power through unlawful acts in the same manner as did the Communists, thereby destroying the democratic government of Arizona. The rhetorical question, "Does he [Church] advocate Communism," having already been answered by the previous purportedly factual statements, does not ameliorate the serious nature of the charges but serves rather to drive home to the reader the conclusion that Church was indeed advocating Communism.

That parts of the editorial may be fairly susceptible of another or other interpretations, that is to say, are not libelous per se, does not detract from or exclude the clear charge that Church wished to operate in the same way as the Communists, by intimidation, blackmail and terror.

> " 'It is further the law in this state and elsewhere that if the language charged to be libelous is unambiguous it is the function of the court to say whether it is libelous per se.' Broking v. Phoenix Newspapers, supra [76 Ariz. 334, 264 P.2d 415]." Phoenix Newspapers v. Choisser, 82 Ariz. 271, at 276, 312 P.2d 150, at 153.

Accordingly, it is my opinion that the trial court properly

instructed the jury that the editorial was libelous per se.

The jury, under the instructions of the trial court, found actual malice, malice in fact. I do not think it can reasonably be argued that there is insufficient evidence to sustain the verdict in this respect. The author of the editorial, Michael Padev, gained his information about Church's speech from a newspaper report, which is deserving of being requoted in part since, I believe, it is determinative of the question.

"CHURCH FLAYS LEGISLATURES' 'THIRD HOUSE'

> "FLAGSTAFF (Special)—Atty. Gen. Wade Church last night called for a 'people's council' to offset the special interest 'third house' which rules Arizona from Hotel Adams.
>
> "He urged organized labor to join churches, PTAs, minority groups, and others and hire full-time personnel to match lobbyists with the mines, power group, construction industry, finance interests, and cattle-groups."

The newspaper account points out that what Wade Church meant by his use of the phrase "people's council" was to "hire full-time personnel to match lobbyists" with other interests. In representative government, lobbying is a lawful and accepted procedure for communicating the wishes of the electorate to the membership of legislatures. No stretch of the imagination can equate this democratic process with the Communist technique for the seizure of power through intimidation, blackmail and terror. The editorial is not only false but the jury could have concluded that Padev must have known it was false. From knowledgeable falsity or a reckless disregard of whether it was false, there can be inferred malice. New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686; St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262; Beckley Newspapers

Corp. v. Hanks, 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248; Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, reh. denied 389 U.S. 889, 88 S.Ct. 11, 13, 19 L.Ed.2d 197, 198; Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456; Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597; Henry v. Collins, 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892; Garrison v. State of Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125. See for example the statement in Curtis Publishing Co. v. Butts, supra, 388 U.S. 130 at 153, 87 S.Ct. at 1991:

> "That is to say, such officials were permitted to recover in libel only when they could prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity."

The court instructed the jury, at the appellants' request, on the issue of malice as follows:

> "Now, as previously stated, in order for plaintiff to be entitled to recover in this case, he must prove by a preponderance of the evidence not only that the editorial and any reasonable inferences therefrom complained of was false, but also that the defendants were actuated or motivated by actual malice in publishing it.
>
> "In this connection, you are instructed that to establish actual malice, you must find that the publication was wrongfully and intentionally published with spite or ill will towards the plaintiff, and with a desire to injure him. Mere negligence or carelessness alone is not sufficient."

The instruction does not conform to the subsequent ruling of the United States Supreme Court in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, adhered to and quoted with approval in the numerous cases since. See cases cited supra. The present interpretation of

the First Amendment requires that a publication of and concerning a public official be false, and made either with the knowledge that it was false or with reckless disregard as to whether it was false.

The appellants' requested instruction was a correct exposition of the law as it then existed in Arizona. Phoenix Newspapers v. Choisser, supra; Broking v. Phoenix Newspapers, supra. Our invariable rule forbids that a litigant complain of his own requested instructions. We will not permit a party to lead the trial court into error. However, it is apparent that appellants, in good faith, attempted to apprise the trial court of the law in Arizona. This was their responsibility. They should not be charged with clairvoyance in not anticipating the course of the decision in New York Times v. Sullivan supra. The decision in that case was announced March 9, 1964. Appellants' opening brief was filed in this Court on April 20, 1964, and, while no reference was there made to the Times decision, the reply brief discussed it in detail. Further, counsel subsequently devoted the principal portion of his oral argument to the question of malice as it related to the Times decision. Accordingly, I am of the view that appellants timely raised the constitutional issue and this Court must give it the recognition that the Supreme Court of the United States did in Curtis Publishing Co. v. Butts, supra, and Rosenblatt v. Baer, supra.

The quoted instruction has been specifically condemned in Rosenblatt v. Baer wherein the United States Supreme Court stated:

> "* * * it is clear that the jury instructions were improper. * * * The trial court * * * defined malice to include 'ill will, evil motive, intention to injure. * * *' This definition of malice is constitutionally insufficient where

discussion of public affairs is concerned; * * *." 383 U.S. 75 at pp. 83, 84, 86 S.Ct. 669, at p. 675.

But were this Court to consider that the appellants could not question their own requested instruction, we would still be compelled to find reversible error in the light of the appellee's requested instruction also given by the court as discussed by Justice Lockwood.

Appellants raise two further matters which should be briefly considered in order that this case be correctly disposed of on retrial. First, appellants pleaded the defense of fair comment. They urge that this is a complete defense to the action and complain that the trial court refused to give their instruction embodying fair comment. In New York Times v. Sullivan, supra, it was recognized that the defense of fair comment is defeasible if actual malice is established. (See footnote 33.)

But the failure to give an instruction on fair comment is, in my opinion, clearly reversible error. There are certain statements in the editorial which are obviously comment. The jury should be instructed alternatively that the appellants are entitled to comment fairly upon any factual statements made without actual malice but as to any comments which are derived from or follow from knowingly false statements, or statements made in reckless disregard of whether they are true or false, the defense of fair comment does not apply.

Second, appellants complain of the introduction of certain exhibits as evidence of malice. It is not necessary to comment on each exhibit but sufficient to point out that evidence of aggravating circumstances is always admissible to enhance punitive damages where tortious conduct is

alleged. Lutfy v. R. D. Roper & Sons Motor Co, 57 Ariz. 495, 115 P.2d 161. On retrial, such of the appellee's evidence as shows aggravating circumstances should be admitted for consideration by the jury limited by a cautionary instruction that such evidence is admitted only for the purpose of establishing or enhancing punitive damages.

Because of the lack of adequate instructions on malice and fair comment. I am of the opinion the case must be reversed for retrial.

[Opinion of Udall, Vice Chief Justice (Concurring in part and dissenting in part) and opinion of Bernstein, Justice (dissenting) omitted.]

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1128

PHOENIX NEWSPAPERS, INC., a corporation; and MICHAEL PADEV,

Appellants,

vs.

WADE CHURCH,

Appellee.

On Appeal From the Court of Appeals, State of Arizona, Division One, Department B.

APPELLANTS' REPLY TO MOTION TO DISMISS.

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Dated: March 16, 1976.

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SUBJECT INDEX

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APPELLANTS' REPLY TO MOTION TO DISMISS.

Appellants' Objection to Misuse of Prior Decision.

Appellee has made liberal use throughout his "Motion to Dismiss or Affirm" of arguments, conclusions and assertions as found in the majority opinion of the Arizona Supreme Court in its 1968 opinion reversing the judgment entered upon the first trial of this action. (103 Ariz. 582, 447 P.2d 840.) Some have been culled from the opinion of the Court of Appeals; others from the reported decision. The justification offered is that in its opinion the Court of Appeals stated:

> "Inasmuch as the evidence during the second trial was in most respects substantially identical

to that introduced in the first trial, we will not attempt to set forth the *background facts* pertinent to the libel claim." (Emphasis added.)

From this unsupported and unfounded base, appellee engrafts upon the record here the various excerpts from the first decision as if supported by the record here.

The transcript of the evidence and exhibits received in evidence during the first trial and a part of the record in the Arizona Supreme Court *were not before the Court of Appeals and are not part of the record here*. The record in the Court of Appeals, as certified by the Clerk of that Court to this Court, is barren of even a smidgen of evidence which was introduced on the first appeal, identified as such.

That appellants disagreed with the first decision and opinion, as reflecting a fair reading of the proof offered on the first trial is evident from the fact they petitioned this Court for certiorari which petition, not surprisingly, was denied. (394 U.S. 959.)

As illustrative of the distortion which resulted through reading into this record excerpts from the majority opinion appellants point to the excerpt from appellee's "Counterstatement of the Case" (pp. 5, 6) which consists in major part of quotations from the 1968 decision as if it reflected the *evidence* in this record.

The record in this case is clear that neither Padev nor Pulliam had read or had access to the entire speech Church gave at Flagstaff [R.T. Vol. IV, p. 361] when the editorial was written and published from which the Arizona Supreme Court quoted at length and considered as supporting proof of "actual

malice". The question for decision must be resolved in the light of facts known to Padev and Pulliam when the editorial was written and published.

The bias which infected the 1968 Supreme Court decision is pointed up by its quoted excerpt from the Gazette news story (which is quoted in full in the Appendix to Appellants' Opening Brief in the Court of Appeals (p. 10, *et seq.*)), which unfairly implies that the speech reference to employing lobbyists was made in conjunction with the people's council recommendation. This is demonstrated by the physical arrangement of the quoted excerpt referring to employing lobbyists as if appearing as immediately following the "people's council" part of the speech. In fact it follows a suggestion that labor must undertake "a far more effective public relations program" at a place in the speech substantially isolated from the people's council recommendation. (Appendix p. 12.)

Appellants had the following matters before them when the editorial was written and published:

(a) Radio newscasts which referred to Church's proposal that labor establish a "people's council";

(b) An Arizona Republic News article which was headed "Church Flays Legislature's Third House" and (i) which reported Church advocated a people's council to offset the special interest "third house" which ruled Arizona from Hotel Adams; and (ii) that labor join with churches and similar groups to hire full-time personnel to match lobbyists of the so-called special interest groups;

(c) A Phoenix Gazette News article which was headed "Labor Urged to Combat Third House"

and which made no reference to labor joining with churches and others in employing full-time personnel but did report that Church urged the *creation* of a "people's counsel" to offset the effects of the "third house" of the legislature through which (he says) management dominates the law-making in Arizona.

This represents the factual information which inspired Padev to write the editorial except that Church by his repeated "savage" and "brutal" attacks upon the legislature, other public officials and banks, utilities and insurance companies, plus his early expressed admiration for "economic democracy in Russia because big capital doesn't control it", had caused Padev real concern as to Church's motives.

Appellee's "Jurisdiction".

Appellee would turn aside appellants' claim that the validity of Arizona Rules of Civil Procedure, 50(a) and 50(b), and A.R.S., Section 12-2102, as applied by the Arizona Courts, contravened the First and Fourteenth Amendments to the United States Constitution as explicated by the Court in *Times v. Sullivan,* (1964) 376 U.S. 254, 11 L.Ed.2d 286, 84 S.Ct. 710, and its progeny by asserting that the violation of appellants' constitutional rights, if found, merely violated "settled practice of the Arizona Courts." In support of its position, appellee makes reference to *Baltimore & P.R. Co. v. Hopkins,* 130 U.S. 210, 9 S.Ct. 503, 32 L.Ed. 908 (1889). The case is plainly not helpful.

Justice Fuller stated the claim asserted by the plaintiff in error, the *Baltimore & P.R. Co. v. Hopkins,*

supra, in justifying review by the United States Supreme Court as follows:

> ". . . and it was claimed on behalf of the defendant that it possessed and exercised authority by virtue of grants from the United States to do all that it did do in the premises, the validity of which authority, it is now insisted, was denied by the Court." (32 L.Ed. 909.)

The Court said:

". . .

"The case at bar does not involve the exercise of an authority under the United States, in the sense of an authority to act for the Government; but it is claimed that the railroad company acted under certain statutes of the United States authorizing such action, and that the validity of these statutes, or of authority under them, was denied.

". . .

". . . The validity of the statutes, and the validity of authority exercised under them, are, in this instance, one and the same thing; and 'the validity of a statute,' as these words are used in this Act of Congress, refers to the power of Congress to pass the particular statute at all, and not to mere judicial construction as contradistinguished from a denial of the legislative power. In our opinion the validity of no Act of Congress, or authority under the United States, was so drawn in question here as to give us jurisdiction, and therefore, as the amount of the judgment did not exceed five thousand dollars, . . ."

Appellee overlooks the function of Rules 50(a) and 50(b) of the Arizona Rules of Civil Procedure and the function of A.R.S., Section 12-2102.

While it is true that at common law a court of general jurisdiction had inherent authority, subject to certain limitations, to grant a new trial, 66 C.J.S., Sec. 115, p. 328,[1] exercise of that power by Arizona trial courts must be exercised pursuant to the requirements of the rule as established through the "settled practice" and as explicated by Arizona precedents. The trial court in granting or denying such motion "must be warranted by law and guided by established precedents."

Sharpensteen v. Sanguinetti, 33 Ariz. 110, 262 Pac. 609;

Rothman v. Rumbeck, 96 P.2d 755, 54 Ariz. 443;

Joy v. Raley, 540 P.2d 710, 24 Ariz.App. 584 (1975);

Southern Ariz. Freight Lines v. Jackson, 63 P.2d 193, 195, 48 Ariz. 509 (1937).

The Arizona cases therefore establish that Rules 50(a) and 50(b) confirm and also delimit this power and write into the power thus granted the requirement that the trial court must apply the rules as if there was set forth in the wording of the Rules as written the requirement, in effect: "In passing upon such motion the trial judge shall accept all tendered evidence favorable to the party against whom the motion is directed

[1]"The legislature may limit or restrict this power by providing "the specific instances in which a new trial may be granted." *Mann v. Superior Court,* 127 P.2d 970 (Cal.Ct.Appeals 1942); *Spruce v. Wellman,* 219 P.2d 472, 98 Cal.App. 158.

as true, shall draw all reasonable inferences in favor of such party and shall view the case in the light most favorable to such party.

Plainly the Court of Appeals, in its evaluation of the evidence as supporting acceptable proof of "actual malice" did not apply the required standards which this Court has stated explicitly and clearly in *Times* and the numerous decisions following *Times.*

The Court of Appeals ignored the undisputed fact that a serious communist infiltration was under way in this country during the period 1917-1919 utilizing the "people's council" device as the entry wedge and that Padev and Pulliam were well aware of this historical fact.

No mention is made by the Court of the fact Church had followed a communist line in his repeated attacks upon other officials, including the Arizona Legislature. That such was the case was not denied or disputed by Church nor did appellee offer any challenge to the testimony characterizing this line of action with communist practices.

All of this the Court of Appeals ignored.

Even if the argument of appellee to the effect that only a "settled practice" of the Arizona Courts is at stake, certainly the hurt to appellants' constitutional rights is equally severe whether the blow be administered by a state rule and statute or by a state court "settled practice."

If review by appeal is not supportable, then review by certiorari is required.

Appellee's Response to Question I.

Appellee's response to this question demonstrates that there is considerable uncertainty in the trial and appellate courts as to this federal question. Such a question cannot be deemed insubstantial since adherence to the commands of the First and Fourteenth Amendments as properly understood by trial and appellate judges in administering justice is at stake.

Appellee's Response to Question II.

Appellee relies upon the Court of Appeals' analysis of the evidence of "actual malice" bolstered by conclusions voiced by Justice Lockwood on the first appeal as demonstrating adequate proof of "actual malice" meeting *Times* standards. Appellee then concludes that it is inappropriate "to ask this Court to review the evidence *de novo* in view of the studied evaluation of the evidence by the Court below.

This Court has quite repeatedly emphasized that such a review is its obligation in cases such as this—an obligation for which these appellants are truly thankful.

The Court of Appeals found support for a finding of "actual malice" in:

1. The newspaper articles above discussed (ignoring the fact of radio newscast reports of the "people's council" recommendation);

2. Padev's admission that he did not think Church was a communist or communist sympathizer;

3. The "claimed admission" by Pulliam that he didn't believe Church was a communist;

4. The extensive knowledge which Padev had of communism.

With respect to the newspaper articles, a fair-minded reading of either does not lead to the conclusion that Church had reference to only lobbyists. When read together, the conclusion is clear that Church recommended "hiring" lobbyists and "creating people's councils."

Certainly this is true, when it is realized that the very phrase "people's councils" used in these circumstances is understood to indicate a communist infiltration technique, to an informed person.

Certainly one does not "create" lobbyists.

Certainly the "claimed admission" of Pulliam is no evidence at all. Pulliam said: [R.T. 292, 293]

> "I said as far as I know he isn't a communist. I don't know—how do I know what he is? Do you know what he is?" . . . "Nobody knows whether a man is a communist or not."

Finally the Court of Appeals (among other things) ignored Church's history of admiration for Russian communist practices; ignored his continued violent attacks upon banks, other public officials, financial institutions, and the Legislature; and ignored the fact that Padev knew communist infiltration is accomplished through use of so-called liberals or left-wingers who may act innocently.

So also the Court of Appeals ignored the established fact that the function of editorial writers and columnists is not that of reporting on statements and events, but of taking reported statements and events, at face value, and editorializing and commenting upon statements of newsworthy people.

Appellee's Response to Questions III and IV.

Inasmuch as appellee has limited his response to these two questions to a *pro forma* response embodying only quotations from the earlier appellate decision and from the decision by the Court of Appeals, appellant will rest upon its prior presentation in the jurisdictional statement.

The "Respondeat Superior" Question.

The Court said in *Times v. Sullivan,* 376 U.S. 254, 11 L.Ed.2d 286, 84 S.Ct. 710, 711:

> "Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, *since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement.*" (Emphasis added.)

Pulliam's good faith confidence in Padev as an expert in communism and its practices was not impeached. Pulliam relied upon Padev's assurances that "people's council" in fact historically had referred to political intrigue having for its ultimate purpose seizure of political power.

Pulliam himself recalled the communist infiltration of the United States in the 1917-1920 era through formation of "people's councils".

Pulliam as President of Phoenix Newspapers and Publisher of the Arizona Republic and Phoenix Gazette

was convinced that the editorial should be published and he alone directed its publication.

If Phoenix Newspapers, Inc. can be held liable in this case despite the adequate inquiry made by its publisher to make sure the publication of the editorial was justified, it would seem that the First Amendment shield of free press and free speech has been badly dented.

No one has disputed Padev's knowledge of communism and its practices and technique.

No one has challenged his honesty as a reporter and columnist.

No one has advanced any reason why Padev *would intentionally misread* the newspaper accounts of the proposals Church made.

No one has challenged Pulliam's good faith in fully relying upon Padev's expertise particularly when it is bolstered by his own not inconsiderable knowledge of communism.

To conclude that under these circumstances Pulliam's good faith authorization of the publication of the editorial does not insulate the newspaper company from liability robs *Times* of much of its vitality.

If Phoenix Newspapers is liable, does Pulliam or his estate owe Phoenix Newspapers' indemnity for having authorized an unlawful publication?

Respectfully submitted,

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